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FREDERICK ALLIS
ATTORNEY & COUNSELLOR AT LAW
NO. 1 BROADWAY NEW YORK

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ODERN REPORTS;

IN TWELVE VOLUMES.

A NEW EDITION, CORRECTED;

AND INCLUDING

hree Hundred and Eighty-One Additional Caſes,

FROM

The RESTORATION of CHARLES the SECOND,

TO

HE TWENTY EIGHTH YEAR of GEORGE the SECOND.

Robt Walters

MODERN REPORTS;

OR,

SELECT CASES

Smith

ADJUDGED IN
THE COURTS
OF
KING's BENCH,
CHANCERY, COMMON PLEAS,
AND
EXCHEQUER,
FROM
THE RESTORATION OF CHARLES THE SECOND,
TO
THE TWENTY-EIGHTH YEAR OF GEORGE THE SECOND.

IN TWELVE VOLUMES.

THE FIFTH EDITION,
CORRECTED:
WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,
AND THREE HUNDRED AND EIGHTY-ONE CASES,
By THOMAS LEACH, Eſq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

LONDON:
PRINTED FOR G. G. AND J. ROBINSON; E. AND R. BROOKE;
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L. WHITE, DUBLIN.

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PREFACE

TO

THE FIFTH EDITION

OF

THE MODERN REPORTS.

THE laſt Edition of THE MODERN REPORTS was publiſhed about thirty years ago, in ſeven volumes folio, under the auſpices of MR. PICKERING's name; and, in the title-page, it is ſaid, that many thouſands of new and proper references had been added. To thoſe ſeven volumes the induſtry of ſeveral later Reporters has added five more; but in the margins of the additional volumes a very few ſolitary references only are to be found. The whole work, previous to the preſent edition, conſiſted of collections of Select Caſes in Law and Equity, from the Reſtoration of CHARLES THE SECOND to the death of GEORGE THE FIRST; the merit of which, and their long admitted authority in the ſuperior courts, are too well known to require obſervation.

The former edition having been a long time out of print, and the public demand for the work continuing to operate on its ſcarcity, a very high premium was gradually ſuperinduced upon the original value (a): this conſideration, conjoined with the idea of introducing the many judicial and parliamentary alterations which ſeveral of the points of law have undergone ſince its *firſt* publication, has induced the Proprietors to furniſh the Profeſſion with a new edition.

The text of the laſt Edition, in the collocation of words, and in the punctuation of the ſentences, is in ſeveral places very imperfect: It has therefore been carefully collated with that of the original impreſſion, and ſuch alterations made in the preſent Edition as appeared to be neceſſary.

A variety of Caſes, without any name to them, are, in the former edition, frequently crowded together in ſo confuſed a heap, that, in the firſt ſeven volumes, the marginal references of one Caſe are not, at firſt ſight, clearly diſcernible from thoſe of another; this aggregation has been ſeparated, and the reſpective Caſes diſtinguiſhed by the title "ANONYMOUS," except where, on comparing them with contemporary Reporters, the true and real names of the Caſes have been diſcovered.

Very imperfect and frequently erroneous abſtracts of the ſeveral points which the Caſes contain, appear in the margins of the old editions; theſe therefore have been, in a great number of inſtances, entirely expunged, and other epitomes extracted to ſupply their places.

(a) The former Edition of this work, in twelve volumes folio, ſold for Fourteen Pounds; the preſent Edition, including its additions, is only about half that price.

In the arguments of Counſel, and ſometimes in the deciſions of the Court, the perſons delivering their opinions are deſcribed by their TITLES inſtead of their NAMES, as *Mr. Attorney*, *Mr. Solicitor*, *The Chief Juſtice*, *The Court*, *&c.* leaving it uncertain who they were. In the preſent Edition, therefore, the names of the ſeveral Judges of the Court in which the queſtion was debated, as well as thoſe of THE ATTORNEY and SOLICITOR GENERAL of the time, have been prefixed at the commencement of every Term, in the ſame manner as in Sir JOHN STRANGE's Reports.

THE MARGINAL REFERENCES, as far as Mr. PICKERING's publication extends, are certainly very numerous; but a general complaint prevailed that many of them were either inapplicable, or made to books of doubtful authority. An attempt, however, to remove the labours of ſo eminent an editor as Mr. PICKERING would perhaps have appeared invidious and arrogant; and therefore the Marginal References as they ſtand in the firſt ſeven volumes have been left untouched, except only thoſe which, upon a very careful examination, appeared to have no relation whatever to the ſubject they were deſigned to illuſtrate, and except altering the circumlocution with which ſome of them are expreſſed; as 1. *Mod. Caſes in Law and Equity*—*Caſes Temp. Mac.*—*Caſes Temp. Qu Ann.*—*Caſes Temp. Will.* 3.—into the more appoſite and laconic abbreviations of 8. *Mod.* 10. *Mod.* 11. *Mod.* and 12. *Mod.*—

THE NOTES and REFERENCES which accompany ſuch of the *Caſes* as ſeemed to the Editor to require explanation, are placed ſeparately at the bottom of each Caſe; and no pains have been ſpared to render them accurate.

It is well known, that moſt of the Caſes, eſpecially in the firſt volumes of the work, are differently reported by many contemporary Reporters; the ſeveral Reports of the ſame Caſe therefore have been compared with each other, and the material points in which they differ, and in which they agree, marked out, and accompanied by references to ſuch Caſes as appear to confirm or contradict the deciſion of the Court.

The alterations which the determinations of the Courts and the Acts of the Legiſlature have ſince made upon the Law of the Caſe, are alſo introduced; and in order to render the NOTES more full and complete, a reference is made to ſuch Caſes as appear to have any analogy to the ſubject.

The promiſed aſſiſtance of ſeveral reſpectable Characters in the Profeſſion, induced the Editor to hope, when he firſt engaged in the undertaking, that he ſhould be able to amaſs a ſufficient collection of *Manuſcript Caſes* to continue the work, by an additional volume, through the ſeveral chaſms which have been left open by ſubſequent Reporters, to the commencement of THE TERM REPORTS; but this hope, to the extent in which he indulged it, has, for the preſent at leaſt, been diſappointed: He has, however, been enabled to introduce a great variety of *New Caſes* from *Original Manuſcripts* into the preſent edition.

In THE SEVENTH VOLUME will be found a Collection of Caſes argued and determined in the Courts of King's Bench, Common Pleas, and Chancery, from *Eaſter Term* in the ſixth year of GEORGE THE SECOND to *Michaelmas Term* in the eighteenth year of GEORGE THE SECOND.

THE FIFTH EDITION.

The Caſes are *one hundred and fifty-five* in number (*a*), *ſixty-ſeven* of which, namely, thoſe printed in *Italics* in the ſubjoined catalogue, are not reported in any other book.

Part

(*a*) Maccarty *v.* Barrow,
Hearne *v.* Buſhell,
Rex *v.* Mayor of Eveſham,
Gambier *v.* Wright,
Rex *v.* Taylor,
Rex *v.* Carter,
Smith *v.* Boucher,
Thomas *v.* Biſhop,
Braſſey *v.* Dawſon,
Kent *v.* Kent,
Gilmore v. Horton,
May *v.* Oſbourne,
Webb v. Dwight,
Rex v. Hooker,
Rex v. Halford,
Rex *v.* Pole,
Comber *v.* Hill,
Rex *v.* Griffin,
Arthur *v.* Vanderplank,
Bilſon v. Hill,
Rex v. Groſvenor,
Rex *v.* Mayor of Shrewſbury,
Cook v. Vivian,
Rex *v.* Gibſon,
Day *v.* Serle,
Wainwright *v.* Bagſhaw,
Harris *v.* Reeley,
Harris *v.* Burley,
Dobbs *v.* Paſſer,
Gamage *v.* Watkins,
Carey *v.* Hinton,
Deveniſh *v.* Mertins,
Lumley *v.* Palmer,
Rex *v.* Biſhop of Litchfield,
Rex *v.* Betteſworth,
Rex *v.* Refit,
Rex v. Archbiſhop of Canterbury,
Rex *v.* Ellams,
Colonel Pitt's Caſe,
Colmer v. Clark,
Tryon *v.* Carter,
Rex *v.* Pritchard,
Rex *v.* Smith,
Ruſſen v. Coleby,
Robinſon *v.* Beilby,
Hallett v. Lawton,
Aſhburnham *v.* Bradſhaw,
Morſe v. James,
Shipman v Thompſon,
Cockerill *v.* Armſtrong,
Drinkwater v. Quinill,
Davis v. Powell,
Bayley v. Lloyd,
King v. King,
Eaton *v.* Southby,
Pitt *v.* Evans,
Cambridge v. Lamb,
Pain v. Womanſell,
Mathews *v.* Lee,
Pindar v. Smith,
Rex v. Willis,
Olive *v.* Ingram,
Vaughan *v.* Brown,
Rex *v.* Gardner,
Rex v. Edwards,
Thruſtout v. Grey,
Rex *v.* Wyvill,
Rex v. Harman,
Sheriff of Hampſhire v. Godfrey,
Waring v. Bletchington,

Colthurſt

Part of them appear, from the manuſcript, to have been taken by a Mr. Wright; the remainder are certainly the

Colthurſt v. Colthurſt,
Marriot v. Thompſon,
Grigg's Caſe,
Down v. Rowell,
Preſton v. Funnell,
Tapner v. Murlett,
Creek *v.* Pitcharn,
Anonymous,
Boſworth v. Whiteman,
Selmon *v.* Courtenay,
Gurnett v. Wood,
Luſhington *v.* Doſe,
Nelſon v. Bael,
Rex v. Howard,
Rex *v.* Whaley,
Rex *v.* Greenwood,
Rex *v.* Pocock,
Rex *v.* Betteſworth,
Walton v. Jordan,
Rex *v.* Munoes,
Haſwell *v.* Shailee,
Ford's Caſe,
Rex v. Bigaman,
Rex v. Morgan,
Warden v. Rous,
Shuttleworth *v.* Pilkington,
Talbot *v* Hubble,
Roe v. Roe,
Boyer *v.* Bampton,
Heathcoat *v.* Goſſling,
Rex v. Nance,
Bartlett v. Gawler,
Johnſton v. Wilſon,
Carver v. James,
Bradford v. Brien,
Peachy v. Oſbaldiſton,
Rex v. Dr. Bland,
Marlow v. Forbes,
Vernon *v.* Jefferies,
Elliſton v. Comyns,
Martin *v.* Jenkins,
Dormer *v.* Parkhouſe,
Rex *v.* Mayor of Weymouth,
Jones v. Gegg,
Dent *v.* Coates,
Rex *v.* O'Brien,
Morgan v. Griffith,
Rex v. Seymour,
Rex *v.* Evindon,
Portland v. Wynne,
Rouſe v. Patterſon,
Rex *v.* Sparrow,
Rex *v.* Crofts,
Rex *v.* Jenour,
Rex *v.* Harman,
Smith *v.* Huggins,
Rex *v.* Jones,
Walker *v.* Kerney,
Barnſley *v.* Baldwyn,
Hamilton *v.* Atherley,
Thompſon v. Slicer,
Smith *v.* Scaiffe,
Wilder *v.* Hendy,
Dent *v.* Coates,
Hayſman v. Moon,
Godman *v.* Morley,
Oates *v.* Jackſon,
Cheſton *v.* Crawley,
Fiſher *v.* Kitchenman,
Goodridge v. Goodridge,

Dabble

the production of Luke Benne, Eſq. an eminent Barriſter at Law of that period.

In the Ninth Volume will be found an additional Collection of Caſes in the Court of Chancery during the time of Lord Hardwicke, from *Michaelmas Term* in the tenth year of George the Second, to *Trinity Term* in the twenty-eighth of George the Second. Theſe Caſes (*a*) fill two hundred and eighty-three pages; are *ninety*

Dabble v. Elſtol,
Duckworth *v.* Tunſtall,
Griffin *v.* Fawſon,
Ratcliffe v. Goodcheap,
Boſworth *v.* Budgen,
Read v. Vaughan,
Cary v. Jefferſon,
Plumb v. Marſon,
Pilgrim v. Kinders,
Atkinſon v. Setree,
Milbourne *v.* Read,
George v. Kinch,
Mallock v. Eaſtly,
Hall *v.* Douglas,
Wynne *v.* Wynne.

(*a*) *Evitt v. Williams*,
Garbut *v.* Wilſon,
Sheldon v. Sheldon,
Boughton *v.* Boughton,
Cheeſeman *v.* Partridge,
Graydon *v.* Hickes,
Says *v.* Price,
Sorreſby v. Hollins,
Attorney General *v.* Lord Gower,
Pomfret v. Murray,
Ex parte Gumbleton,
Crop *v.* Norton,
Hodſell *v.* Buffell,
Newſtead *v.* Johnſton,
Sterling v. Penlington,
Gower *v.* Grovenor,
Harvey *v.* Harvey,
Salt v. Chambers,
Robinſon v. Cox,
Man v. Parkinſon,
Gibſon v. Stiles,
Chapman v. Turner,
Partridge *v.* Partridge,
Northey *v.* Northey,
Kennedy v. Ackland,
Mayor of York *v.* Pilkington,
Lockwood *v.* Ewer,
Patman v. Seymour,
Bagſhaw v. Newton,
Brizick v. Manners,
Attorney General v. Landerfield,
Gomer v. Graham,
Rogers *v.* Downs,
Jackſon *v.* Butler,
Wilkinſon v. Sterne,
Williams

ninety in number, and *fifty-two* now for the firſt time reported; they were all of them, except the laſt thirteen, printed from a collection of Manuſcript Caſes preſerved in the library of the late SAMUEL SALTE, Eſq. *of the Inner Temple*; they appear to have been taken with great accuracy, and many of them bear the author's name, which is printed as it appeared in the original manuſcript.

Williams v. Williams,
Bell v. Howard,
Woodcroft *v.* Kynaſton,
Weſton v. Bowes,
Ward v. Henſel,
Bennet *v.* Vade,
Richards *v.* Baker,
Richards *v.* Sims,
——— *v. Fitzgerald*,
Thornhil *v.* Evans,
Horner v. Bendloes,
Smith *v.* Wyatt,
Clerk *v.* Perryam,
Hall *v.* Carter,
Charitable Corporation *v.* Sutton,
Ex parte Phelps,
Stanhope *v.* Cope,
Stringer v. New,
Montgomery v. Attorney General,
Sergiſon *v.* Sealey,
Iveſon v. Moulſton,
Steward *v.* Eaſt India Company,
Montgomery *v.* Attorney General,
Sergiſon *v.* Sealey,
Elwys v. Thompſon,
Patterſon *v.* Taſh,
Le Noy *v.* Ducheſs of Athol,
Attorney General v. Baliol College,
Bedford v. Gilſon,
Ex parte Turner,
Selwyn v. Honeywood,
Wilkinſon v. Sterne,
Wingfield v. Newton,
Pipon v. Pipon,
Jobſon v. Petty,
Meadburn v. Iſdal,
Skip v. Edwards,
Wilſhaw v. Smith,
Dillon v. Green,
Walſh v. Patterſon,
Furnwiſe *v.* Crew,
Giblet v. Read,
Jones v. Legg,
Lloyd v. Manby,
Gwyn *v.* Hook,
Parſons v. Parſons,
Ex parte Wincheſter,
Bailey *v.* Wilſon,
Bland v. Bland,
Ellinor v. Garton,
Paget *v.* Gee,
Ritſon v. Lord Middleton,
Wilkes v. Holmes,
Adams v. Danvers,
Bowles v. More.

The

THE FIFTH EDITION.

The laſt thirteen Caſes in this volume were kindly ſent to the Editor, through the hands of one of the Proprietors of the work, by Charles Butler, Eſq. *of Lincoln's Inn*; a gentleman whoſe liberality is co-extenſive with his learning, and to whom the Profeſſion is already much indebted for his valuable labours in the modern editions of Coke upon Littleton.

To the Eleventh Volume is added a Collection of Select Caſes in the King's Bench, from *Trinity Term* in the fourth year of George the First, to *Michaelmas Term* in the fourth year of George the Second. They are *one hundred and thirty-ſix* in number, *ſeventy-eight* of which are not reported in any other work (a). Theſe Caſes

---

(a) *Gough v. Simpſon*,
Rex *v.* Hales Owen,
Paine's Caſe,
Rex v. Walderſham,
Eyres v. Hardres,
Trott v. Gagg,
Arnold *v.* Meredith,
Gough v. Crear,
Fenn v. Alſton,
Thomas's Caſe,
Jeffs *v.* Bolton,
Clerk's Caſe,
Rex v. Vaux,
Anonymous,
Hainſworth v. Wilſon,
Clerk v. Birch,
Rex *v.* Saunders,
Rex v. Bridgewater,
Rex *v.* Burcleer,
Rex v. Gribble,
Rex v. Pocklington,
Alderman v. Cutting,
Rex v. Adams,
Atkins *v.* Berwick,
Rex v. Grant,
Morris's Caſe,
Rex v. Lowton,
Rex v. Corrett,
Anonymous,
Taylor v. Jeſts,
Anderſon v. Buckton,
Hargill v. Hunt,
Markham v. Dutra,
Rex v. Wentworth,
Rex v. Edwards,
Anonymous,
Earl v. Coleman,
Fiſher v. Sparrowhawk,
Graham v. Leach,
Rex v. Mayor of Bridgewater,
Rex v. Wilders,
Somerby *v.* Stretton,
Shelton v. Sire,
Beacon *v.* Peck,
Tibbs v. Clow,
Guiſe v. Ellis,

Hammond

Caſes were ſelected from a Collection of Law Manuſcripts; the production of JONATHAN WELLS, Eſq. Barriſter at

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Hammond v. Rogers,
Dean of Weſtminſter v. Herbert,
Rex v. Dobbins,
Davillar v. Herring,
Rex v. Furneſs,
Turner v. Brewer,
Poole v. Flitt,
Rex v. Nichols,
Roberts v. Hamilton,
Rex v. Townſend,
Saville v. Saville,
Hobbey v. Thornhill,
Anonymous,
Reed v. Rew,
Nicholſon v. Simpſon,
Bayley v. Burman,
Stephens v. Careleſs,
Rex v. Gibſon,
Rex v. Jenkins,
Rex v. Iſlip,
Cumber v. Wade,
Sibbord v. Quin,
Cutler v. Goodwin,
Bodmin v. Pike,
Graveney v. Feverſham,
Wright v. Hammond,
Crompton v. Ward,
Woodford v. Green,
Jeffrey v. Wood,
Fitzacherly v. Wiltſhire,
Stratford v. Neale,
Rex v. Crompton Martin,
Vicars v. Worth,
Gronehouſe v. Cleaver,
Peters v. Gillam,
Pitt v. Coney,
Smith v. Trigg,
Bernard v. Fitzhouſe,
Button v. Heywood,
Gardner v. Wallers,
Spiller v. Andrews,
Cooper v Darly,
Brecon v. Newton,
Sheen v. Lammas,
Heaven v. Davenport,
Anmy Cruſis v. Barneſley,
Williamſon v. Mathews,
Makeplaint v. Diſton,
Beamond v. Rowland,
Hayne v. Manning,
Branley v. Fraſier,
Rex v. Carter,
Cotes v. Robinſon,
Caſe of Lambeth Pariſh,
Badermine v. Pike,
Rex v. Carliſle,
Amwell v. St. John's,
Rex v. Laſhmere,
Rex v. Mayor of Kingſton,
Jenney v. Herle,
Rex v. Borroughs,
Horn v. Cooper,
Rex v. Edwards,
Rex v. Cripland,
Skipwith v. Green,
Le Neve v. Skill,
Rex v. Hull,
Barker v. Giles,
Baron Price v. Lord Coningſby,
Rex v. Aſhley,
Warren v. Conſtat,
Rex v. Maſon,

Rex

at Law, and were preſented to the Editor by William Bleamire, Eſq. a gentleman who is now employing his active talents and independent mind to the advantage of the Public, in diſcharging the important and uſeful duties of a Magiſtrate, for the preſervation of *the peace* and in the ſupport of *the police* of this great and populous metropolis.

To this Edition therefore have been added *three hundred and eighty-one* Caſes, of which *one hundred and thirty-ſeven* have never before appeared in print. The greateſt number of them appear to poſſeſs an extraordinary degree of merit; the ſtatement of the facts, the arguments of Counſel, and the judgments of Court being extremely full, and bearing every intrinſic mark of correctneſs and authenticity, more eſpecially thoſe which are inſerted in the Seventh and the Ninth Volumes. The Manuſcripts of all of them have been preſerved with every poſſible care, and are now in the poſſeſſion of the Publiſher, open to inſpection.

The Indexes to the Firſt, Second, Third, Fourth, Fifth, Sixth, Seventh and Eleventh Volumes are entirely new, and thoſe of the remaining Volumes have been carefully corrected.

Rex *v.* David,
Purſell v. Purſell,
Macleod *v.* Slee,
Smith *v.* Bailey,
Rex v. Pratt,
Loydads v. Smith,
Rex v. Farlow,
Rex *v.* Mayor of Canterbury,
Twyford *v.* Huggins,
Caſtle *v.* Richardſon,
Palmer *v.* Ekins,
Johnſton *v.* Weſt,
Rex *v.* Aynhoe,
Kinnerſton *v.* Freſcobaldi,
Rex v. Franklin,
Carr v. Goſlington,
Wright *v.* Canning,
Rex v. Talbot.

PREFACE TO THE FIFTH EDITION.

THE NAMES OF THE CASES to all the Volumes, which in the former edition were very incorrect, are entirely new.

The Editor has thus endeavoured to render the work more uſeful to the Profeſſion; but in an undertaking pregnant with ſo many difficulties, and in which ſuch variety of labour was required, it would be in vain to hope that many defects neceſſary to have been noticed may not have eſcaped his obſervation.

MODERN REPORTS;

R,

SELECT CASES

ADJUDGED IN

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KING's BENCH,

CHANCERY, COMMON PLEAS,

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VOLUME THE SEVENTH.

MODERN REPORTS;

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SELECT CASES

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THE COURTS

OF

KING'S BENCH,

CHANCERY, COMMON PLEAS,

AND

EXCHEQUER.

VOLUME THE SEVENTH;

CONTAINING,

A Collection of Cases argued and adjudged in the Court of King's Bench, at Weſtminſter, in the Reign of Queen Anne, during the time *Sir* John Holt, *Knight*, was Chief Juſtice of the Court.—Taken by Thomas Farresley, *of the Middle-Temple, Eſq.*

TO WHICH IS NOW ADDED,

A Collection of Cases argued and determined in the Courts of King's Bench, Common Pleas, and Chancery, from Eaſter Term in the Sixth Year of George the Second to Michaelmas Term the Eighteenth of George the Second.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Eſq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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EASTER TERM,

The Firſt of Queen Anne,

IN

The Queen's Bench.

1702.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
* * * * * * * * * * * *
Sir Henry Gould, *Knt.* }
Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

* Memorandum.

Caſe 1.

THE FIRST RETURN of this Term was, by proclamation, cut off, and THE TERM adjourned to the ſecond return.

Term adjourned. Poſt. 152.

1. Sid. 276. 1. Lev. 176. 178. 1. Keb. 942. 2. Keb. 76. 152.

Wright *againſt* Crump.

Caſe 2.

PER CURIAM. If the jury in an inferior court will not agree in their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, until they agree; and THE STEWARD may adjourn the court from time to time until they agree.

Jury in an inferior court ſhall be kept together until they agree.

S. C. Holt's Rep. 404. 1. Salk. 201.

SECONDLY, Generally a *levari facias* is not the proceſs of A HUNDRED-COURT, but it may be it by cuſtom; and generally all

Levari facias not the proper proceſs in a hundred-court. Poſt. 44.—1. Salk. 201. 2. Lev. 81. Comb. 124. Lutw. 588.

WRIGHT *againſt* CRUMP.

all the hundred-courts in *England* have ſuch a cuſtom: the true common-law proceſs is a *diſtringas*.

Attachment on contempt of judicial officers.
Poſt. 38. 84.

THIRDLY, All miſdemeanors in a judicial officer is a contempt of this court, and every day AN ATTACHMENT is granted againſt a bailiff of an inferior court for granting an attachment againſt all the parties goods.

S. C. 1. Salk. 201.
S. C. 2. Ld. Ray. 766.
Ld. Ray. 468. 556.

And HOLT, *Chief Juſtice*, remembered a caſe of the *Mayor of Hertford*, where a court was held before him only, and he, pretending right to a houſe, made himſelf leſſor of the plaintiff, and gave judgment for his own leſſee; and for this he was brought up by ATTACHMENT, and laid by * the heels; though he got off the eaſier, for that he had been an old cavalier: this he ſaid was in my LORD HYDE's time. But on the other hand, an officer is not to be puniſhed for an error in his judgment.

* [2]

Verdict on a juror's knowledge.
S. C. Holt's Rep. 404.
1. Salk. 405.
Stra. 642.

PER HOLT, *Chief Juſtice*. If a jury give a verdict upon their own knowledge, they ought to tell the Court ſo; but the fair way had been, for ſuch of the jury as had knowledge of the matter, before they are ſworn, to tell the thing to the Court, and be ſworn as a witneſs.

Jury diſcharged *ſans* verdict.
1. Salk. 201.
8. Mod. 95. 289. 336.
Ld. Ray. [illegible]6.

NOTE, All this was ſaid by the Court upon a motion for AN ATTACHMENT againſt a ſteward of an inferior court, who had diſcharged a jury without giving a verdict.

But THE COURT would hear further before they granted an attachment.

Caſe 3. Doctor Woodward's Caſe.

At what time judgment on a warrant of attorney may be entered.
S. C. poſt. 13. 93.
Poſt. 115. 139.
1. Salk. 402.
6. Mod. 14. 16. 282.
Com. Rep. 117.
Tidd's Pract. 694. 706.

THE QUESTION was upon the regular entry of a judgment upon a warrant of attorney.

PER CURIAM. If a year paſs after a warrant of attorney given, judgment cannot be entered upon it without leave of the Court; but if one give a warrant in Vacation to give judgment as of laſt Term, his death does not determine that warrant, becauſe the party was alive at the time of the judgment entered; and the time of entering the judgment is not expreſſed on *the roll*, but in *the margin*, and the uſe of it is for the ſecurity of purchaſers only; but without it, it is good againſt the party.

ALSO, if a defendant make default, ſo as the plaintiff might have entered judgment againſt him, and before actual entry the defendant dies, yet the plaintiff may enter his judgment as of the Term in which default was made.

HOLT, *Chief Juſtice*, quoted *Shelley's Caſe* (*a*), who died at four o'clock in the morning of the day on which the recovery was; ſo that if you reckon hours or minutes, he was dead at the time of the

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(*a*) 1. Co. 93. 1. And. 69. Moor, 136. Jenk. 249.

the recovery had; yet it was held good: ſo if the caption of a fine be taken in the Vacation, if the writ be returnable the next Term, the death of the party determines it; but if it be returnable the Term before, it ſhall be well, notwithſtanding the party's death.

Doctor Woodward's Case.

Anonymous.

Caſe 4.

IF A JUDGMENT be below for the plaintiff, and a writ of error is brought and the judgment reverſed, yet, if the record will warrant it, * the Court ought to give a new judgment for the plaintiff; but if the judgment be erroneous and againſt the plaintiff in the merits, that ought to be reverſed, and a new judgment given for the defendant.

Erroneous judgment.

* [3]

Comb. 314.
1. Saund. 180.
2. Saund. 256.
1. Salk. 262.
401.
1. Ld. Ray. 9.

PER CURIAM. If an erroneous judgment be for a defendant, and it is reverſed, and the merits appear for the plaintiff, he ſhall have judgment; but if the merits be againſt the plaintiff, the defendant ſhall have a new judgment: ſo in THE EXCHEQUER-CHAMBER; for they are to *reform* as well as to *affirm* or *reverſe*.

Atwood *againſt* Burr.

Caſe 5.

Eaſter Term, 13. *Will.* 3. *Roll* 46.

ERROR OF A JUDGMENT on a *ſcire facias* againſt bail in THE MAYOR'S COURT of *Maidſtone*.

Error on a judgment in inferior court againſt bail on a *ſcire facias*.

The writ recited, that a plaint was levied in debt upon a bond againſt *J. S.* by the plaintiff, on the ſeventeenth day of *July*, the ſixth year of the king, "*in curiâ domini regis villæ regis de Maidſtone*;" and that thereupon *a ſummons* iſſued, returnable the thirty-firſt of *July*, and, after a *nihil* thereunto returned, a *capias* returnable the fourteenth of *Auguſt* following, by which the defendant being taken, and appearing on the return of the *cepi corpus*, the defendant became his bail, and entered into a recognizance to pay the condemnation with coſts and charges of ſuit. The *ſcire facias* further recited a former *ſcire facias*, and commanded the officer *ſicut prius*, &c. A *ſcire feci* was returned, and judgment given againſt the bail.

S. C Carth. 447.
S. C. Lilly Ent. 228. 290. 403.
S. C. 2. Ld. Ray. 821.
1. Salk. 404.
5. Mod. 304.
Comb. 149. 161.
Ld. Ray. 216.
Fitzg. 175.

And in *Michaelmas Term*, in the thirteenth year of *William the Third*, upon the writ of error, many exceptions were taken.

FIRST, That in this caſe the inferior court can only award execution of goods, lands, and tenements, within their juriſdiction, and therefore the *ſcire facias* ought to run ſo, and not generally as here.

How execution in an inferior court may be given.

HOLT, *Chief Juſtice*, anſwered, that the recognizance is well taken, "that in caſe judgment be againſt the defendant to levy the "condemnation of his goods and chattels, lands and tenements;" that the common courſe of the court of king's bench is ſo, although in the court of common pleas they bind in a ſum certain; and that the ſummons need not be cramped up by words to the juriſdiction of the court, for that ſhall be underſtood.

Damages includes *coſts*, when the action is for a debt certain.

N. Lutw. 185.

Secondly, After iſſue joined, and a *venire facias* to try it, the defendant in the original *relictâ verificatione cognovit actionem*, and judgment againſt him in one hundred pounds *debt*, and fifty pounds *damages*, without any mention of *coſts*, and the prayer of the *ſcire facias* againſt the bail is to have execution *de debito et damnis*, ſo not according to his recognizance.

Holt, *Chief Juſtice*. Where the demand is of a debt certain, one need ſay no more than *damna* to include *coſts*, except it be on taking a verdict on a trial where *coſts* are to be mentioned; but upon confeſſion, *nihil dicit*, *&c.* it is never, or, at leaſt, need never be done.

Proceſs from an inferior court in the name of the mayor is good.

Thirdly, The *ſcire facias* is in the *mayor's name*, whereas it ought to be in the *king's name*, and *teſted* by the mayor, it being a proceſs of the king's court.

Holt, *Chief Juſtice*, anſwered, that it is the conſtant practice of all inferior courts to make the proceſs in the name of the mayor.

*[4]

On a writ of error, a variance between the *ſcire facias* and the original record is immaterial.

* Fourthly, The *ſcire facias* recites a plaint levied the ſeventeenth of *July*, and on the record it appears to have been on the fourteenth of *July*.

Holt, *Chief Juſtice*, anſwered, that upon a *writ of error* there can be no advantage taken of *a variance* between the writ of *ſcire facias* and the original record.

Form of proceſs on a recognizance.

Fifthly, In a *ſcire facias* againſt a recognizance, it ſhould be *in eâ parte*, and here it is *in hâc parte*.

Holt, *Chief Juſtice*, anſwered, that it is true the right way is not to ſay "*in hâc parte*," in proceſs upon a recognizance; but that it has now obtained ſo long as to make it good either way; and we muſt not hinder it.

Scire facias on a recognizance in an inferior court.

Sixthly, The command of the writ ought to be to ſummon the party, if found within the juriſdiction: but here it is general.

Holt, *Chief Juſtice*, anſwered this exception as in the anſwer to the firſt exception.

Seventhly, Here went an *alias ſcire facias*, upon which this judgment is; and the firſt *ſcire facias* is not returned; and ſo they ſhew on the record.

* HOLT, *Chief Juſtice*, as to this exception, which was the chief, aſked the Counſel on the other ſide, how they could proceed upon a *ſcire facias* which was not returned, as here the firſt was not; for there ought to be ſome anſwer to the writ; as that the party had nothing, &c. that he *ſcire fecit*, or *non eſt inventus*; for if there be no return, I doubt it will be *a diſcontinuance*, and that cannot be cured by *appearance*; but after verdict a *miſcontinuance* is cured, and there being no return to the firſt, or ſo much as a recital of it on the ſecond, but only "*ſicut prius præceptum* "*eſt*," it will be hard to maintain it; and if you do not appear at the return, you cannot appear at all, if the proceſs be not continued down. If there be *an original* returnable in *Trinity Term*, and the defendant do not appear, but come in *Hilary Term*, all is wrong, if there be not a continuance to *Hilary Term* down duly entered. If *ſcire facias* be returnable *die Jovis prox. poſt tres ſeptim. S. Michael.* if the party appear *craſt. S. Martini*, it will be an incurable gap, for none can appear when he has no day by the writ or on THE ROLL, and here is neither. And ſuppoſe the firſt *ſcire facias* had been well returned, and an *alias* had iſſued out returnable in *June*, and the defendant appeared in *Auguſt*, all would be bad without a continuance entered until *Auguſt*; becauſe without it the defendant has no day in court. But he ſaid, perhaps the want of a return of the *ſcire facias* might be cured by the day on THE ROLL where the *teſte* and iſſuing out of the writ is, which perhaps may be a ground for an *alias*, and alſo a day for appearance. And he ſaid, that upon pleading the *ſtatute of Limitations* he always uſed to plead *the return* and not *the purchaſe* of a writ; for it was the return that gave the poſſeſſion of the cauſe to the Court (*a*). And if one were to continue a *latitat* for ſeveral years, he muſt get the firſt returned; upon which return you make your continuances down, though you never take out another; but there muſt be a return of the firſt writ. So if a *capias ad ſatisfaciendum* be taken out within a year, you may continue it down as long as you pleaſe upon a *vicecomes non miſit breve*, and not be put to a *ſcire facias*; ſo there is a vaſt difference between the writ to which the defendant has an anſwer, and one to which he has none; for if it be a writ to which the party has a plea, there muſt be ſome ſort of a return, or that it came *tardè*, but ſtill there muſt be ſome return; and for this he quoted the caſe of *Sir John Vidian v. Welling* (*b*); and, can any court hold plea of a writ before it comes back to them? And if you come to ſet it forth by *ſicut alias*, you * ought to ſet it out at large. And he ſaid, he would ſupport it if he could, for the ſake of THE SUITORS, who have been at the charge of purchaſing the franchiſe, and not for the ſake of THE STEWARD; for they generally oppreſs the people.

If an *alias ſcire facias* iſſue before the firſt *ſcire facias* is returned, it is a diſcontinuance.

Poſt. 124.

1. Salk. 177.
1. Saund. 338.
3. Salk. 131.
Ld. Ray. 21. 706. 716.

Poſt. 7. 50. 68.
Ld. Ray. 383. 434. 553. 880. 1429.
2. Vern. 695.
Fitzg. 289.
8. Mod. 73. 227.
1. Peer. Wms. 742.
2. Peer. Wms. 144.
3. Peer. Wms. 36.
Stra. 10. 301. 461.

* [6]

(*a*) See 1. Roll. 376. Salk. 89. 1. Bac. Abr. 41. 4. Hawk. P. C. 124. 3. Burr. 1423. that the day of ſuing out the writ is the commencement of the ſuit.

(*b*)

An error in proceſs cannot be taken advantage of on a writ of error on a judgment in *ſcire facias* againſt the bail.

THE CASE was argued again this Term.

BRODERICK took exceptions:

FIRST, That the original declaration was, that the defendant "*per ſcriptum ſuum obligatorium, &c.*" The defendant pleads "*non eſt factum*;" and a *venire* to try the cauſe was, "*ad recognoſcendum ſi ſcriptum obligatorium præd.*" was the deed of the defendant, which he ſaid was a contradiction; and then there being no day on THE ROLL to the party but the day on the *venire*, which is none, the *venire* being contradictory, the confeſſion of *relictâ verificatione* is void, and the judgment grounded thereupon erroneous.

HOLT, *Chief Juſtice*, anſwered, Take it to be ſo, and that it is a plain *diſcontinuance*, which is the utmoſt you can pretend, you cannot take advantage of that in an error upon the judgment on the *ſcire facias* againſt the bail. If bail be to an action in this court, and a *ſcire facias* againſt the bail, and judgment againſt them by *nihil dicit*, in a writ of error of that judgment they cannot ſay that there was no judgment in the original action, becauſe that ought to have been pleaded on the *ſcire facias*; for though it be eſſentially neceſſary to charge the bail, there ſhould be judgment againſt the principal, yet that muſt be taken advantage of in pleading upon the *ſcire facias*, and never upon a writ of error.

Vide 1. Vent. 78.

A judicial writ muſt be returned before an *alias* can be ſued out thereon.

SECONDLY, It was objected, the want of a return of the firſt *ſcire facias*; for an entry was made that the officer had not returned it.

Ld. Ray. 1143. 1257.

TO WHICH *it was anſwered* by Counſel, that true it is, upon a writ iſſuing out of chancery returnable in the common pleas or in this court, no proceedings can be until it be returned, for until then it is not depending; otherwiſe where the writ iſſues out of the ſame court and is returnable there (a). And the ancient practice was, that when a writ iſſued out of this court, an entry was made of it on THE ROLL; and where a man is to loſe his inheritance, or incur a penalty, he may appear on the day on THE ROLL, though the officer has not returned the writ.

*[7]

Poſt. 50. 68. Ante, 5.

* HOLT, *Chief Juſtice*. The ancient way was, to make a record of the original; and in the common pleas they went by way of recital, "*Dominus rex miſit breve ſuum clauſum in hæc verba*:" now a *ſcire facias* is ſued out here, and an entry made of "*vicecom. non miſit breve*," and ſued out and returned, and the party appears: Why ſhall they not proceed upon this ſecond writ? And though the firſt be not returned, yet there is an entry of it on the plea-roll, and upon that the other proceedings are founded; and the ſecond refers to it *ſicut alias*.

(a) See the Year-Book 2. *Edw.* 4. pl. 11. 5. Co. 47.

Atwood *againſt* Burr.

The case being argued again in *Michaelmas Term*, in the firſt year of *Queen Anne*,

Holt, *Chief Juſtice*, declared, that he had ſpoke to Coke, *Prothonotary of the Common Pleas*, who aſſured him, he never knew a proceeding upon a ſecond *ſcire facias*, the firſt not returned; and he ſaid, that though the defendant had a day in court upon the *ſcire facias* being entered on the roll at its iſſuing, yet there can be no proceeding upon it until it be returned, and you ſhould get a return made; no matter whether executed or not (*a*).

If judgment on a *demurrer* to a plea be entered, "*And therefore it is conſidered, &c.*" and not "*And becauſe* it appears to the Court here, that the plea of the ſaid defendant is inſufficient in law, &c." it is erroneous.

Another exception taken was, that this was a judgment on *demurrer*, and they gave a *final judgment* without giving an interlocutory one, "*quia videt. Cur. &c.*"

And it was ſaid, that the forms of judgments ought to be ſtrictly kept to; and therefore "*conceſſum*" or "*adjudicatum*" has been held bad in an inferior court. And this is like the caſe of a ſpecial verdict, where the ſpecial fact is left to the judgment of the Court (*b*). It is not enough that judgment be given for him that ought to have it, but it muſt alſo be upon a right ground (*c*).

S. C. 1. Salk. 402.
2. Salk. 603.
5. Mod. 397.

Holt, *Chief Juſtice*, ſaid, that ſuch a fault would be amended now; and he ſaid, that always upon *demurrer*, before you proceed to final judgment, you ſay, "*quia videt. Cur. quod placitum, &c.* "*Ideo conſideratum eſt*;" and here they give final judgment, when, for aught appears, they have not determined the matter ſubmitted to them; and though it be not eſſential to give a reaſon for their judgment, yet it is material to decide the matter put in judgment.

*[8]

The Court ſeemed inclined to reverſe the judgment for theſe two errors (*d*).

A writ of error on a *ſcire facias* againſt bail is bad, if it be *in adjudicatione executionis judicii* inſtead of *in adjudicatione executionis ſuper recognitionem*.

S. C. 1. Ld. Ray. 328. 553.
S. C. 3. Salk. 369.
S. C. Carth. 449.

Raymond, *for the defendant*, perceiving this, took exception to the writ * of error, that it was, "*quod in adjudicatione executionis* "*judicii præd. error intervenit*," where it ſhould be, "*in adju-* "*dicatione executionis recognitionis præd.*"

And though Powell, *Juſtice*, ſaid, that a *recognizance* was a *judgment*, and wanted nothing but execution to make it a complete judgment;

Holt, *Chief Juſtice*, ſaid, yet it was another ſpecies of a judgment which ought to be ſhewed.

(*a*) It is ſaid, that this caſe was ſtirred again in *Hilary Term*, the fourth of *Queen Anne*, and that the firſt writ, when awarded, ſhould be entered on the roll, for the defendant has a day by the roll; and therefore the writ is depending before the return of it: and therefore in this caſe, if there had been ſuch an entry, it had been good with this award of *ſicut prius, &c.* S. C. 2. Ld. Ray. 1252.

(*b*) 1. Roll. Rep. 305. 309. Cro. Jac. 372. Cro. Eliz. 227.

(*c*) See Owen, 19.

(*d*) It is ſaid, S. C. 1. Salk. 402. that the judgment was reverſed on this laſt exception.

Atwood *againſt* **Burr.**

And the Court were of opinion to quaſh the writ of error for this exception (*a*).

(*a*) But ſee 1. Salk. 89. 2. Ld. Ray. 1252.

Caſe 6.

Anonymous.

A bailiff may break open the door after *touching* a perſon againſt whom he has a warrant through the *window* of the houſe.—6. Mod. 173. 211. 1. Salk. 79. And ſee the ſame point adjudged in the king's bench, in Hilary Term, 12. *Geo.* 2. in the caſe of the Sheriff of Hampſhire *v.* Godfrey (*a*).

PER Holt, *Chief Juſtice.* If a window be open, and a bailiff put in his hand and touch one for whom he has a warrant, he is thereby his priſoner, and may break open the door to come at him.

(*a*) See alſo 3. Bl. Com. 288. Foſter, 319. 3. Hawk. P. C. ch. 14. ſ. 9. 2. H. Bl. Rep. 120, and Lee *v.* Ganſell, Cowp. 1.

Caſe 7.

Jacob *againſt* Dallow.

The ordinary has, of common right, the diſpoſal of ſeats in a church.

S. C. 2. Salk. 551.
S. C. 6. Mod. 230.
S. C. 2. Ld. Ray. 755.
S. C. 12. Mod. 233.
5. Mod. 436.
6. Mod. 338.

A LIBEL was inſtituted in the ſpiritual court for diſturbing in a ſeat in a church.

The defendant below comes for a prohibition, and ſuggeſts a preſcriptive right in himſelf.

And a *prohibition* was granted and declared on.

And for a *conſultation*; the defendant ſet up a preſcriptive title to himſelf, and traverſed that of the plaintiff; and upon demurrer, a *conſultation* was awarded.

For per Curiam, The ordinary has of common right the diſpoſal of ſeats, if there be no temporal right ſet up againſt it, as the now plaintiff has done here, *viz.* his preſcription; and that is now traverſed (*a*).

(*a*) The plaintiff, in his declaration, ſhewed a preſcriptive right to the ſeat; the defendant pleaded a uſage to ſit in the ſeat, and traverſed the preſcription; and to this plea the plaintiff demurred: and it was contended, that although the plaintiff by his demurrer had admitted the traverſe of the preſcription, yet that the defendant could not have a *conſultation*, becauſe he had pleaded *a uſage*, which was not triable by the ſpiritual court. But Holt, *Chief Juſtice*, was of opinion, that as the pleadings admitted *the poſſeſſion* of the defendant, the ſpiritual court has conuſance of the diſturbance of ſuch poſſeſſion, and, no temporal right being infringed, may ſettle and quiet it according to the uſage: and *a conſultation* was accordingly granted by the whole Court. S. C. 2. Ld. Ray. 756.—And ſee Gooche *v.* Biſhop of London, that there ſhall be no prohibition until it appears that the preſcriptive right is in queſtion. Stra. 879.

Caſe 8.

Anonymous.

Prohibition lies after ſentence, if want of juriſdiction appear.
Poſt. 137. 148.—Stra. 187.

AFTER sentence in a ſpiritual court, they will not grant a *prohibition*, except it appear upon the face of the proceedings to be matter out of their juriſdiction. *Quære* (*a*).

(*a*) See 2. Inſt. 602. 2. Burr. 813. Cowp. 424. 1. Term Rep. 552. 4. Term Rep. 473.

Davila *againſt* Dalmanſer.

Caſe 9.

A SUBMISSION TO AN ARBITRATION was by rule of court, purſuant to the ſtatute 9. & 10. *Will.* 3. c. 15.; and after the arbitrators had made ſome progreſs in the matter, the party came and ſnatched away the papers, and ſo hindered farther proceeding.

An attachment lies for hindering an award.

S. C. 1. Salk. 73.
Ld. Ray. 857.
1. Stra. 695.
2. Stra. 1178.

And by HOLT, *Chief Juſtice*, there ought to be *an attachment*, if the party did not enlarge the rule, and pay coſts.

* [9]

* Lumly *againſt* Quarry.

Caſe 10.

TROVER AND CONVERSION FOR A SHIP, which the defendant, as judge of the admiralty court of *Pennſylvania*, condemned, for want of being regiſtered in *England*.

A Judge of a foreign court of admiralty ſhall give bail in trover for a ſhip condemned by him.

The action was brought in the ſheriff's court in *London*; and being removed by *habeas corpus* to the king's bench,

THE QUESTION WAS, Whether there ſhould be bail as this caſe ſtood?

S. C. 1. Salk. 101.
S. C. Holt, 88.
S. C. 2. Ld. Ray. 767.
Stra. 479.
Ld. Ray. 372. 603. 893.

HOLT, *Chief Juſtice*, ſaid, that though it was upon a *habeas corpus*, they might enquire into the cauſe of action, and, if they ſaw occaſion, order ſpecial bail; for otherwiſe inferior courts might be made uſe of to oppreſs people, by laying great actions upon them there (*a*).

And here, PER CURIAM, if the defendant has acted as Judge, and the matter was within his cognizance, his ſentence, whether right or wrong, binds until it be reverſed; and if it were in the admiralty of *France*, it would be ſo; and the only remedy in ſuch caſe is to appeal.

Sentence of a foreign court of admiralty is concluſive till reverſed.

3 Keb. 785.
3. Mod. 194. Bull. N. P. 245. 2. Term Rep. 649. 4. Term Rep. 382. and ſee Park on Inſur. page 353 to 364.

(*a*) Bail was ordered to be put in for good; for if the defendant acted as Judge, he will be out of danger of any action; but if he did not act as a Judge, then it is very reaſonable that *ſpecial bail* ſhould be put in. S. C. 2. Ld. Ray. 767.

Anonymous.

Caſe 11.

HOLT, *Chief Juſtice*. The writ of *ne exeat regnum* ought not to be granted but upon great reaſon and examination; otherwiſe a *homine replegiando* may lie.

A *homine replegiando* lies upon a *ne exeat regnum* improperly granted.—2. Salk. 581. 702. Ld. Ray. 613. 943. 987. Prec. Chanc 171. 230, 492. Caſes T. T. 396. Gilb. Eq. Rep. 149. 1. Peer. Wms. 263. 3. Peer. Wms. 313.

The

Caſe 12. The Queen *againſt* Ewer.

If the condition of a recognizance be, "to give "notice to a "man *and* his "clerk," and a *ſcire facias* ſtates it to have been, "to give notice "to the man *or* "his clerk," the *variance* is fatal.

SCIRE FACIAS upon a recognizance entered into before HOLT, *Chief Juſtice*, conditioned, that one *J. S.* ſhould appear to an indictment againſt him, and carry it down to trial, according to the ſtatute 7. & 8. *Will.* 3. c. 32. (*a*).

The defendant demurs to it.

FIRST, There is *a variance* between the *ſcire facias* and the recognizance. The recognizance recited is, that upon iſſue joined, the defendant would give notice of trial to the proſecutor *and* his clerk; and the true recognizance entered into is to give notice to the proſecutor *or* his clerk: ſo there is a variance.

S. C. 2. Salk. 564. S. C. 3. Salk. 369. S. C. 2. Ld. Ray. 756. S. C. Holt, 612. Ld. Ray. 152. 536. 697. 702. 715.

If a *ſcire facias* recite a recognizance incorrectly, advantage may be taken of the *variance* without *oyer* of the writ.

SECONDLY, It is not purſuant to the ſtatute; for it is in a greater ſum than the ſtatute requires, which is only twenty pounds each.

IT WAS URGED, *on the other ſide*, that if one would except againſt a writ, he ought to have *oyer* of it (*b*), and that notwithſtanding it be ſet out *in hæc verba*.

6. Mod. 28.
2. Lutw. 1642.
1. Mod. 62.
1. Saund. 9.
5. Co. 74.
Ld. Ray. 347. 892. 970. 1056. 1176.

BUT *it was anſwered*, that it were vain to demand *oyer* of a writ which is already ſet out *in hæc verba* on THE ROLL. Indeed, it is true, that none can except againſt an *original* writ that is not ſet out *in hæc verba*, * without having *oyer* of it.

* [10]

A recognizance taken by a Judge of the king's bench upon the removal of an indictment, in more than the ſum mentioned in 5. *Will. & Mary*, c. 11. is good.

And HOLT, *Chief Juſtice*, ſaid, that the recognizance varies from the ſtatute, and therefore cannot be good by the ſtatute; yet it may be good by the common law. It is true, the recognizance, if not according to the ſtatute, cannot make the *certiorari* a *ſuperſedeas*; for by ſtatute no *certiorari* ſhall be a *ſuperſedeas* without a recognizance of twenty pounds, &c. But before that ſtatute, the Judges of this court had power to take recognizance, which is not taken away by the ſtatute: but only that they ſhall not be ſuch as will make a *certiorari* a *ſuperſedeas*.

Stra. 1165.
Burr. 10.

And the writ was quaſhed for the firſt exception.

(*a*) But ſee 14. *Geo.* 2. c. 17.

(*b*) It is ſaid, S. C. Ld. Ray. 756. that the defendant prayed *oyer* of the recognizance, and of the condition thereof,

Caſe 13. The Queen *againſt* The Pariſh of Milverton.

The ſeſſions cannot make an original order of removal.

UPON AN APPEAL to the ſeſſions, they made an order that the firſt order ſhould be quaſhed, and the party ſent to the pariſh from whence he was thereby removed.

S. C. Sett. & Rem. 206. 2. Salk. 472. 5. Mod. 208. Fitzg. 85. 254. Stra. 1198.

It was agreed, that the juſtices of the ſeſſions had only power to affirm or quaſh the former orders, but not to make a new order.

But becauſe an order may be good in part and void for other part, that part which ordered the poor perſon to be ſent back was quaſhed, and the reſt confirmed.

The Queen *againſt* the Pariſh of Milverton.

Anonymous.

Caſe 14.

HOLT, *Chief Juſtice*. A married woman is to be diſcharged upon *common bail* of courſe; but if it be doubtful whether ſhe be married or not, ſhe ſhall be held to *ſpecial bail*, if the cauſe require ſpecial bail (*a*).

A *feme covert* ſhall be diſcharged on common bail.

6. Mod. 17. 105. 1. Salk. 115. 1. Mod. 8. 1. Lev. 1. 2. Vern. 613. Stra. 1167. 1237. 1272.

(*a*) See Edwards *v.* Rourke and his Wife, 1. Term Rep. 486. Pearſon *v.* Meadow, 2. Bl. Rep. 903. Milner *v.* Miller, 3. Term Rep. 627. Partridge *v.* Clarke, 5. Term Rep. 194. Tidd's Practice, 49.

Anonymous.

Caſe 15.

HOLT, *Chief Juſtice*. It is matter indictable to bury a man that dies of a violent death before the coroner's inqueſt have ſat upon him.

Indictable to bury until after coroner's inqueſt.

3. Hawk. P. C. ch. 9. ſ. 23. Stra. 22. 167. 533. 1097.

Memorandum.

Caſe 16.

IT is a rule of court, that no order of juſtices, whereof an appeal lies, be brought hither by *certiorari* until after appeal; and if any be, that it be ſent back by *procedendo*; for the original order does not come up, but the tenor of it, as appears by the very words of the return.

An order of juſtices, cannot be removed before appeal.

1. Keb. 33.
6. Mod. 246.

1. Salk. 145. 347. 2. Salk. 564. 1. Show. 336.

Feltham *againſt* Cudworth.

Caſe 17.

Eaſter Term, 12. *Will.* 3. Roll 97.

*[11]

SCIRE FACIAS by an adminiſtrator to revive a judgment had by the inteſtate againſt the defendant, who pleaded the ſtatute of Compoſition, 8. & 9. *Will.* 3. c. 18. (*a*), of two-thirds in number and value * of the creditors, and a compoſition for payment of two ſhillings in the pound; *ita quòd* he paid it within five years after he ſhould be diſcharged out of priſon.

Statute of Compoſition of two-thirds pleaded.

S. C. 3. Salk. 59.
S. C. Comy. Rep. 112.
S. C. 2. Ld. Ray. 760.
Poſt. 16. 96.

The whole question, on a demurrer, was, Whether the defendant ought to aver that he had been in gaol?

(*a*) Repealed by 9. & 10. *Will.* 3. c. 29.

FELTHAM *againſt* CUDWORTH.

IT WAS URGED *by the plaintiff*, that he ought, and that the plea was ill for want of it; for the intent of the ſtatute was, that there ſhould be an abſolute poſitive compoſition, either to take leſs than the debt, or to give a longer day of payment, but not to diſcharge the whole debt of the creditors by the compoſition of two-thirds, which would be the caſe here if the defendant had never been in gaol; for the two ſhillings in the pound was not payable until five years after the defendant came out of gaol; and that might be never, if he had not been then in gaol; and then the compoſition might be, that defendant ſhould never pay.

TO WHICH *it was anſwered*, that it is in the power of the two-thirds of the creditors, &c. to make a compoſition general; that a contingent compoſition is a compoſition within their power. Beſides, it was ſaid, that the matter ſubſequent to the *ita quòd* did not depend upon it as upon a *condition precedent*, but that the *ita quòd* was only a *limitation*; as a grant of a rent, provided it does not touch his perſon; or a grant without impeachment of waſte, *ita quòd* he do not commit voluntary waſte.

THE COURT, at another day, held it no good compoſition, becauſe it is ſuch as perhaps the defendant will never be bound to perform, and the *ita quòd* makes it a *condition precedent*, that the defendant ſhould be diſcharged out of gaol; and the ſtatute intended a final abſolute agreement, whereby the creditor is bound to receive ſo much, or to give ſuch time; and if the defendant do not perform ſuch compoſition, the former debt is thereby revived. Suppoſe I covenant with *J. S.* to convey him ſuch lands, *ita quòd* he pay me five hundred pounds by ſuch a day, and he does not pay the money by the day, I am not bound to make over to him the eſtate; for where an *ita quòd* is annexed to an agreement for a thing not executed, it qualifies the matter before, and is the ſame thing as if it were put firſt: and the act means there ſhould be a complete final agreement, and not one depending on uncertainties. Now *non conſtat* that the defendant ever was in priſon, and therefore, for aught appears, the condition precedent never happened, nor is like to happen; and we cannot intend he was impriſoned.

Salk. 171. 231.

* [12] * And PER OMNES, All compoſitions by virtue of this act work by way of defeazance, which if not performed the original debt ariſes.

Judgment for the plaintiff.

Caſe 18. Anonymous.

Toll not incident to a market.

BY HOLT, *Chief Juſtice*. A toll is not of common right incident to a market.

2. Show. 34. 1. Salk. 327. 4. Mod. 319. 2. Bac. Abr. 459. 3. Bac. Abr. 49. 3. Burr. 1404. Cowp. 47. 1. Term Rep. 667. 6. Com. Dig. "Toll" (C).

Anonymous.

Caſe 19.

HOLT, *Chief Juſtice.* It has been held, that an *indebitatus aſſumpſit* would lie for a cuſtomary fine of a copyholder; but, he ſaid, he never could be reconciled to that opinion (*a*).

Aſſumpſit lies for a fine.

1. Show. 257.

Anonymous.

Caſe 20.

HOLT, *Chief Juſtice.* Without a particular uſage, the mayor of a corporation has not a caſting voice.

Mayor.

Ld. Ray. 1236, 1030.

Green *againſt* Rivet.

Caſe 21.

Michaelmas Term, 13. *Will.* 3. *Roll* 316.

IN AN ASSUMPSIT, "*non aſſumpſit infra ſex annos*" was pleaded.

The plaintiff replied, that for the recovery of the ſaid debt he ſued out a *bill of Middleſex*, which he recited in his replication, and it appeared to bear *teſte*, "*die Lunæ poſt tres ſeptimanas Sancti* "*Michaelis, anno quinto, ita quòd parat. habeat* the defendant's "body *die Lunæ poſt très ſeptimanas Sancti Michaelis*," generally, without telling when, and that the defendant promiſed within ſix years before the iſſuing thereof.

The defendant rejoined, that he did not promiſe within ſix years before the iſſuing thereof.

The plaintiff demurred.

The exception was to the replication, *viz.* that it did not appear when the writ was returnable; for it could not be intended to be *immediatè*, without it had been ſo ſaid expreſsly; and in fact a *bill of Middleſex* is never returnable *immediatè*; and it is true, the writ itſelf never mentions the year in which it is returnable; but when one pleads a writ, he ought to do it.

HOLT, *Chief Juſtice*, ſaid, that the ſtatute of Limitations was one of the beſt of ſtatutes, and the pleading thereof no diſcouragement to anybody.

The defendant had judgment *niſi*.

A bill of *Middleſex* pleaded as returnable "on "*Monday next* "*after three* "*weeks of All* "*Souls*," is no bar to the ſtatute of Limitations.

S. C. 1. Salk. 421.

S. C. 2 Ld. Ray. 772.

Ante, 5.

1. Saund. 36. 120. 127.

Comb. 70.

1. Show. 354.

2. Show. 79. 126.

3. Salk. 227.

Ld. Ray. 383. 434. 553. 880. 883. 1429. 1441.

2. Vern. 695.

Stra. 550. 719.

Bull. N. P. 151.

2. Bl. Rep. 1131.

Sir George Tuke's Caſe.

Caſe 22.

ASSUMPSIT. The plaintiff declared, that he was poſſeſſed of a note of the defendant's, by which the defendant promiſed to pay him ſo much money; that the defendant, in conſideration the

A declaration in *aſſumpſit*, that the plaintiff delivered the defendant a note, and that in conſideration thereof he promiſed to pay, &c. is good.—S. C. 2. Ld. Ray. 759. Ld. Ray. 358. 368. 663. 742. 753. 759. Fitzg. 302. Comy. 98. Stra. 94. 406. 592. 648. 653. 728. 933. 1027.

(*a*) It is now determined, that a general *indebitatus aſſumpſit* will lie for tolls, Steward *v.* Baker, 1. Term Rep. 616.; for petit cuſtoms, Mayor of Exeter *v.* Tremlet, 2. Wilſ. 95.; and for a *copyhold fine*, Grant *v.* Aſtle, Dougl. 695.—See alſo Evelyn *v.* Chicheſter, 3. Burr. 1717.

Sir George Tuke's Case.

plaintiff would deliver him the ſaid note, promiſed to pay him the money; that he thereupon delivered him the note; and verdict.

* [13]

It was moved *in arreſt of judgment*, that here was no conſideration; for it did not appear what the * conſideration of the note was; and if the note were without conſideration, the delivery of it up cannot be one (*a*).

2. Salk. 23. 125. 136.
N. Lut. 148.
1. Lev. 165.
1. Vent. 159.
1. Sid. 31. 248.
1. Roll. Ab. 28.

But per Curiam, The delivery of the note being ſaid indefinitely, it ſhall be intended a delivery for ever; and though a note for the payment of money does not carry a conſideration in itſelf, yet it is evidence of a debt, and by conſequence a means whereby he may recover his money (*b*); and the parting therewith is a conſideration, and the defendant has admitted it to be upon conſideration, by demanding it to be delivered. And if the caſe had been, that this had been the note of *J. S.* for payment of money to *J. N.* and *J. D.* in conſideration that *J. N.* would deliver the note to him had promiſed to pay him, it had been a good conſideration; for it is not neceſſary that the matter of the conſideration ſhould be of advantage to the defendant, ſo it be any trouble or diſadvantage to the plaintiff.

Judgment was given for the plaintiff.

(*a*) See Palmer, 171. Saund. 136.

(*b*) By 3. & 4. *Anne*, c. 9. actions may now be maintained on promiſſory notes in the ſame manner as on inland bills of exchange.

Caſe 23.

Anonymous.

Satisfaction acknowledged of a judgment.
Ante, 2.
Poſt. 93.

A. TAKES a judgment in the name of *B.* who dies, and adminiſtration is committed to another. *A.* enters ſatisfaction on the judgment: the adminiſtrator of *B.* moves, that the entry of ſatisfaction be vacated.

And this appearing on a report of the Master to whom it was referred,

The Court ſaid, that the defendant had good *equity*, but they could not help him.

And the rule was to vacate the entry of the judgment *niſi*.

EASTER TERM,

The Firſt of Queen Anne,

IN

The Common Pleas.

Sir Thomas Trevor, *Knt. Chief Juſtice.*
Sir John Blencowe, *Knt.* }
Sir John Powell, *Knt.* } *Juſtices.*
Sir Edward Nevil, *Knt.* }
Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

Prideaux *againſt* Morrice. Caſe 24.

Trinity Term, 12. *Will.* 3. *Roll* 655.

IT was an action on the caſe in the common pleas againſt the defendant *Morrice*, being one of THE VIANDERS of the town of , in *Cornwall*, for not returning the plaintiff, he being duly elected a *member of parliament* for that borough, but inſtead thereof falſly and maliciouſly returning *J. S.* who was not duly choſen.

An action on the caſe at common law will not lie againſt a returning-officer for falſely *returning* a candidate for a ſeat in parliament; but an action lies on 7. & 8. *Will.* 3. c. 7.

Upon a ſpecial verdict finding all the declaration, and farther, that the right had not been determined in THE HOUSE OF COMMONS; and that there was another VIANDER ſtill living;

THE COURT, after ſeveral arguments, delivered their opinions by TREVOR, *Chief Juſtice*, BLENCOW, POWELL, and NEVILL, *Juſtices.*—We are all of opinion, that the defendant ought to have judgment.

* [14]

S. C. 1. Lutw. 82.
S. C. N. Lutw. 31.
S. C. 2. Salk. 502.
S. C. Holt, 523.
S. C. 8. St. Tr. 9.

* FIRST, We do not give our opinions how it would be if the matter had received a determination in THE HOUSE OF COMMONS in favour of the plaintiff.

1. Mod. 145. 6. Mod. 45. 5. Mod. 312. 3. Lev. 29. 1. Vent. 206. 2. Vent. 50. 1. Wilſ. 127. Ld. Ray. 907. 938. 951. 1105.

Secondly, We give no opinion how the action ought to be conceived; whether it ought to be againſt both *the vianders*, or whether it might be againſt one of them; becauſe our opinions are, that it does not lie againſt them anyway.

So that our firſt reaſon is, for that the judging of the right of election belongs to the parliament, that is, to THE HOUSE OF COMMONS; and that is the proper juriſdiction for determining ſuch matters; and therefore it would be very abſurd and inconvenient if it ſhould be tried by a jury or court of *Weſtminſter-Hall*, in an action on the caſe; for that would produce a different determination of the ſame matter by two independent juriſdictions; one might have judgment and damages againſt him in *Weſtminſter-Hall*, for a matter in which he might have done his duty by a vote of THE HOUSE OF COMMONS; and of which THE COMMONS are the ſole judges *(a)*. It is objected, that this inconvenience of claſhing juriſdictions would enſue in caſes where the act of parliament gives the action, and a particular penalty; and yet none will ſay but the action will lie notwithſtanding, even before any determination of the matter in parliament. But the anſwer to that objection is, that where the parliament gives the courts of *Weſtminſter-Hall* a juriſdiction, let the inconvenience be what it will, we may exerciſe the juriſdiction; but it cannot be ſaid, becauſe the parliament has given us a juriſdiction in particular inſtances, that by the ſame reaſon it has given it to us in all caſes: and the argument is, to ſay, becauſe the parliament has given us a remedy, therefore it lay at common law, when the contrary inference is much more natural; and if the parliament had intended to give a remedy, it would have given an action on the caſe; for that had been the moſt adequate remedy, and would ſuit everybody's caſe. And the ſtatute 23. *Hen.* 6. c. 14. that gives a penalty in ſome caſes, takes notice, that before that ſtatute there was not ſufficient remedy. It is alſo objected, *[15] that it is not inconvenient that there ſhould be concurrent juriſdictions; for the queen's bench, the court of common pleas, and the court of exchequer, are ſo. It is true; but that works no inconveniency to the ſubject; for if the ſuit be commenced in one court, and after in another, that court which has firſt poſſeſſion of the cauſe ſhall determine it; and it is a good plea in abatement for a defendant to ſay, that there is an action depending in another court for the ſame cauſe; and a judgment in one court is pleadable in bar to an action for the ſame cauſe in another: but that will not 2. Salk. 512. Ld. Ray. 18. 859. 1247. be ſo in the preſent caſe. As to the caſe of the *Earl of Banbury*, where the court of queen's bench did determine the right of peerage, the anſwer is, that cauſe is not a precedent to be followed, for the conſequence of it is a failure of juſtice to this day; ſo that that caſe is a ſtrong inſtance of the miſchief that we would now avoid.

(a) But ſee the opinion of Willes, *Chief Juſtice*, on this ſubject, in the caſe of Wynne *v.* Middleton, 1. Wilſ. 127, 128. and 10. *Geo.* 3. c. 16.

Prideaux *againſt* Morrice.

avoid. Another argument againſt it is that of *Littleton* upon the *ſtatute of Merton*, *à non uſitato*, the miſchief has always been, as appears by the acts of parliament giving remedy therein, as may be ſeen by the ſtatutes of *Henry the Fourth* and *Henry the Sixth*. Another argument againſt it is, that the right of a third perſon would be tried here between ſtrangers: ſo it would be determining his right by a ſide-wind (*a*).

(*a*) And judgment was given accordingly for the defendant, S. C. N. Lutw. 31. And *a writ of error* was brought in the court of king's bench, and the judgment affirmed, S. C. 2. Salk. 502.—But ſee Norris *v.* Mauduit, 5. Mod. 311. and Sir W. W. Wynne *v.* Middleton, 1. Wilſ. 127.

EASTER TERM,

The Firſt of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.*
Sir Henry Gould, *Knt.* } *Juſtices.*
Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

Carlile *againſt* Greenwood. Caſe 25.

A SCIRE FACIAS was brought on a judgment in the queen's bench at *Weſtminſter*, and the adminiſtrator produced letters of adminiſtration granted by the *Archbiſhop of York.*

And becauſe the judgment was aſſets at *Weſtminſter*, in the province of *Canterbury*, the adminiſtration in the province of *York* did not extend to it.

An adminiſtration in the province of *York* will not ſupport an action, the cauſe of which ariſes in the province of *Canterbury.*

S. C. 6. Mod. 134.

Lylly's Caſe. Caſe 26.

COVENANT lies not againſt an apprentice being an infant (*a*). Apprentice.

S. C. Com. Rep. 38. 8. Mod. 191. 1. Vern. 328. 2. Vern. 492. 518. Stra. 604. 2. Ter. Rep. 159.

*[16]

* Beverly *againſt* Pim. Caſe 27.

AN ACTION ON THE CASE upon ſeveral promiſes; to which the ſtatute of Compoſition of two-thirds was pleaded in bar. But the plaintiff ſhewed the contract to have been made ſince the

Traverſe. Ante, 10. Poſt. 96.

(*a*) See Whitley *v.* Loftus, 8. Mod. 190. Gilbert *v.* Fletcher, Cro. Car. 179. Horn *v.* Chandler, 1. Mod. 271. Branch *v.* Ewington, Dougl. 519. Trueman *v.* Hurſt, 1. Term Rep. 40.

Beverly *againſt* **Pim.**

time of the ſtatute, which the defendant did not traverſe in his plea, as he ought to have done; for if you vary from the time in the declaration, and make ſuch variance material, you ought to traverſe the time in the declaration.

Judgment was given for the plaintiff *niſi.*

Caſe 28.

The Queen *againſt* Clerk.

A coroner's inqueſt is traverſable.

AN INQUISITION taken before the coroner *ſuper viſum corporis* of one who had killed himſelf.

PER TOTAM CURIAM. Such inquiſition is traverſable (*a*).

Quære, If a coroner's inquiſition of *felo de ſe* is good, without the word "*murder.*"

But exception was taken, that it wanted the word "*murdravit*;" for it was, that the party "*Deum præ oculis non babens, ſolus* "*exiſtens in domo ſuâ manſionali voluntariè felonicè et ut felo de ſe,* "*cum cultro pretii, &c. quem in manu ſuâ dextrâ tenuit, jugulum* "*ſuum ſccuit et ſeipſum occidit.*"

S. C. Salk. 377.
S. C. Holt, 167.
1. Salk. 190.
2. Lev. 140.

It was anſwered, that the word "*murdravit*" is not neceſſary in ſuch an inquiſition as this, though it be otherwiſe in an indictment of murder of another perſon, becauſe there are degrees in the offence of killing another, as manſlaughter, murder, which ought to be expreſſed in words, but in the offence of killing one's ſelf there can be no ſuch degrees. In the caſe of *Rex v. Parker* (*b*), TWISDEN, *Juſtice,* ~~held, that the word~~ "*murdravit*" is not neceſſary in ſuch an inquiſition, though there was an opinion to the contrary in the caſe of *Rex v. Alderman* (*c*). 2. *Lev. King v. Parker.*

HOLT, *Chief Juſtice,* ſaid, If it was not for the authority of *Alderman's Caſe,* in my LORD HALE's time, he would think it not neceſſary in the caſe of *felo de ſe*; for he ſaid, the reaſon why "*murdravit*" is neceſſary in an indictment of murder (*d*) is, becauſe clergy does not lie in murder (*e*).

A coroner's inquiſition omitting to ſtate that the deceaſed *died of the wound* is void.
Ante, 10.

HOLT, *Chief Juſtice.* But moſt ſurely a great defect in this inquiſition is, that it is not ſaid he died of the wound ſet forth in the inquiſition; for to what purpoſe has the queen a view of the dead body but to ſhew the jury that the wound is mortal.

4. Co. 44.
3. Mod. 202.
3. Hawk. P. C. ch. 23. ſ. 82.

And, PER TOTAM CURIAM, for this fault the inquiſition was quaſhed; for it is not enough to ſay that it was *felonicè,* but alſo it ought to be ſhewn how it was *felonicè.*

(*a*) See 3. Hawk. P. C. ch. 9. ſ. 55. Rex *v.* Roupel, Cowp. 458. and Rex *v.* Heaton, 2. Term Rep. 184.

(*b*) 1. Keb. 66.

(*c*) 3. Keb. 604.

(*d*) See Dyer, 304. 1. Hale, 450.

(*e*) 3. Hawk. P. C. ch. 23. ſ 77. 4. Hawk. P. C. ch. 25. ſ. 55. 4. Mod. 61.

* Memorandum. Caſe 29.

NOTE, *Midſummer-Day* was on *Wedneſday* this year, and if that had not been *Wedneſday* had been the laſt day of *Trinity Term*, but now it was on *Thurſday*.

Trinity Term cannot end on *Midſummer-Day*.

For by Holt, *Chief Juſtice*, *Trinity Term* may begin on *Midſummer-Day*, but cannot end on it; there can be no return this year in *tres ſeptiman. Trin.* but it muſt be *die Jovis poſt tres ſeptiman. Trin.*

6. Mod. 81. 148. 196. 251. Ld. Ray. 4. 639. 1528. 1557.

And this, he ſaid, had not happened in one hundred years before.

Adam's Caſe. Caſe 30.

A CAPIAS IN WITHERNAM was *teſted* the firſt day of *May*, and returnable *die Jovis poſt tres Trinitatis*.

Withernam ſuperſeded.

The Court ordered the attorney and filazer to attend; for they looked upon it to be a great oppreſſion to make ſuch a long return in order to deprive one of his liberty ſo long.

2. Show. 221. 226. Ray. 474. Ld. Raym. 775.

And here he gave bail *body for body* to appear at the return of the writ; and the *withernam* was ſuperſeded.

Anonymous. Caſe 31.

AN INFORMATION was filed againſt THE PLAYHOUSE for acting profane and lewd plays; and they being bound by recognizance to try it, made up the record wrong, *viz.* "*Lincoln's-Fields*" for "*Lincoln's-Inn-Fields*," thinking to be acquitted upon that *variance*.

Playhouſe proſecuted.

1. Mod. 76. 5. Mod. 142. Comb. 304.

But Holt, *Chief Juſtice*, ordered it to be found ſpecially.

Mr. Attorney moved to have their recognizance eſtreated.

Anonymous. Caſe 32.

SIR RICHARD NEWDIGATE was bound by his recognizance for a twelvemonth to keep the peace againſt his daughter, and for his appearance the firſt day of next Term.

Recognizance of the peace againſt the father.

And the Court ſaid, they could not diſpenſe with his attendance, as they could if it were *de die in diem*, but here he was bound by the condition of his recognizance.

3. Peer. Wms. 103. Stra. 1207. 2. Hawk. P. C. ch. 60. ſ. 17.

TRINITY TERM,

The Firſt of Queen Anne,

IN

The Queen's Bench.

1702.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

*Machil *againſt* Clerk.

Caſe 33.

Eaſter Term, 12. *Will.* 3. *Roll* 342.

ERROR in this court, on a judgment given in the court of common pleas, where the queſtion, upon a ſpecial verdict in ejectment, was this;

A tenant in tail, in conſideration of the marriage of his ſon, covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to the uſe of his ſon and heir, and the heirs-male of his body by his intended wife, with ſeveral remainders over; and after he ſuffers a recovery, in which he himſelf is tenant to the *præcipe*, and vouches over the *common vouchee*; which recovery was to other uſes than thoſe mentioned by the covenant.

If a *tenant in tail* covenant to ſtand ſeiſed of the eſtate-tail to the uſe of himſelf *for life*, with remainder to the uſe of his ſon in tail, and afterwards ſuffer a common recovery, in which he is tenant to the *præcipe*, with ſingle voucher to other uſes than thoſe in the covenant to ſtand ſeiſed, the recovery is good, and bars the iſſue in tail; for the covenant to ſtand ſeiſed made no alteration in the eſtate-tail, but conveys a *baſe fee*, defeaſable only by the entry of the iſſue in tail.—S. C. Holt, 615. S. C. 2. Salk. 619. S. C. Com. Rep. 119. S. C. 2. Ld. Ray. 778. S. C. 11. Mod. 19. 2. Jones, 105. 2. Lev. 75. 213. 225. 1. Mod. 98. 121. 159. 2. Mod. 207. 1. Vent. 372. 2. Vent. 260. 318. Ld. Ray. 155. 289. Gilb. E. R. 17. 3. Peer. Wms. 206. Wilſon on Rec. 247. Wright's Tenures, 186.

Machil *againſt* Clerk.

So THE QUESTION was, Whether the tenant in tail, notwithſtanding the *covenant to ſtand ſeiſed*, continued ſeiſed in tail, for then the recovery was good, otherwiſe it could not be good in this caſe, he coming in as tenant to the *præcipe*.

WILLIAMS here argued, that the covenant was void.—Eſtates-tail owe their being to the ſtatute *De Donis*, which is the only law that reſtrains conveyances of them at this day; and the care of that ſtatute regards only the iſſue and thoſe in reverſion or remainder, and does in no way extend to the party himſelf during his life: and in favour of ſolemn conveyances, the iſſue himſelf, and thoſe in reverſion and remainder, are put to their action in caſe of feoffments and fines by a tenant in tail, and in all caſes the tenant himſelf is bound by his alienation or conveyance as well ſince as before the ſtatute. Until the ſtatute 27. *Hen.* 8. c. 10. no legal eſtate paſſed by the conveyance of a *covenant to ſtand ſeiſed*, which was but only a uſe; but now by that ſtatute, *the uſe* draws the *poſſeſſion* to it; and then, by this conveyance, the tenant in tail is ſeiſed to his own uſe for life, the remainder to *J. Machil* his ſon in tail; which conveyance the tenant in * tail cannot avoid in his own life: and then it follows, that he only has an eſtate for life with remainders over; ſo that the ſuffering of *a recovery* is a forfeiture of his eſtate. The *covenant to ſtand ſeiſed*, by the rule of grants, ſhall be taken moſt ſtrongly againſt him, and moſt advantageouſly for thoſe who are to take by it; and the rather, for that here the uſes are to him for whoſe benefit the ſtatute *De Donis* was made, *viz.* the eldeſt ſon, that is, the heir apparent. It is objected, that this being by way of *covenant to ſtand ſeiſed*, nothing paſſes but what may lawfully paſs as in the caſe of a grant; and then it will make no alteration of the eſtate tail. But I anſwer, that it is true a *covenant to ſtand ſeiſed* does not work *a diſcontinuance*, yet all the eſtate may be as much deveſted out of the tenant in tail himſelf as if there were *a diſcontinuance*, and the covenant will not paſs away the remainder limited over, but it will paſs *a baſe fee*, or put the eſtate-tail in abeyance. Suppoſe he had covenanted to ſtand ſeiſed to the uſe of his ſon immediately, or to the uſe of a third perſon immediately, with remainders over, would not that put the eſtate-tail *in abeyance*, or paſs a baſe fee? And how does this caſe differ from that? A *covenant to ſtand ſeiſed* operates like *a bargain and ſale*, that is, by way of uſe; both enure by way of grant, and receive their virtue from the ſtatute of Uſes; and all the difference is, that the ſtatute of *Henry the Eighth* ordains, that no eſtate of freehold ſhall paſs by the ſtatute of Uſes, in caſe of bargain and ſale, until inrollment, but that is only a condition *ſine quâ non*; and it is the ſtatute 27. *Hen.* 8. c. 10 that both raiſes the uſe and creates the eſtate; then if tenant in tail bargain and ſell his eſtate to a man and his heirs, a baſe fee will paſs (*a*). And though *Littleton* ſays (*b*), that if tenant in tail grant *totum ſtatum ſuum*, the grantee has but an eſtate for life of the tenant in tail, yet that muſt be

N. Lut. 242.
Comb. 128.
2. Salk. 679.
3. Salk. 307.

* [19]

(*a*) Plowden, 557. 3. [illegible] 84. Cro. Car. 489. (*b*) Co. Lit. 332.

meant, that he has but an abſolute indefeaſable eſtate only during his life, but ſtill during his life he has a baſe fee; and the iſſue, after the death of the tenant in tail, may bring *a formedon* againſt the grantee, which ſhews the eſtate was not abſolutely determined by his death *(a)*. If tenant in tail bargain and ſell to another and his heirs, and afterwards levy a fine to *A.* and his heirs, to the uſe

Machel *againſt* **Clerk.**

* [20]

* of *A.* and his heirs, the bargainee now has an eſtate to him and his heirs, during the continuance of the eſtate-tail, which the fine to the uſe of another could not give if he had it not before. Some hold, that by the bargain and ſale of the tenant in tail to a man and his heirs, he only has a deſcendible freehold, and the eſtate-tail is in abeyance *(b)*. And after ſuch bargain by tenant in tail to another and his heirs, the tenant in tail has no reverſion or remainder in him; and he cannot puniſh waſte, or enter for a forfeiture; and therefore all the right of the eſtate will be out of him, and by conſequence in abeyance: and here if the right of entail be in abeyance, it will do as well for my purpoſe; for if it be out of him at the time of the ſingle voucher, it will be a void recovery. If tenant in tail covenant to ſtand ſeiſed to the uſe of one for years, remainder to the uſe of his firſt ſon in tail, this puts the eſtate-tail in abeyance. So if he covenant to ſtand ſeiſed to the uſe of *A.* for the life of *B.* and after to the uſe of *C.* this puts the eſtate-tail in abeyance: and it is no anſwer to ſay, that where tenant in tail covenants to ſtand ſeiſed for years, or for life of another, ſtill there remains ſomething more in him which he may grant over; for the eſtate for years, or for the life of the other, may determine during the life of the tenant in tail, and then the remainder over may poſſibly take: but where he covenants to ſtand ſeiſed for his own life, he has done what he can lawfully do; and any covenant over is what he cannot lawfully do, and therefore it is of no force; for where tenant in tail covenants to ſtand ſeiſed to the uſe of another, during his own life, ſtill there remains ſomething in him in reſpect whereof he can puniſh waſte and enter for a forfeiture. And why cannot he grant this intereſt out of himſelf by way of remainder, as well as grant it out of himſelf in another manner, where he grants *totum ſtatum ſuum*, in which caſe the eſtate-tail is ſo entirely out of him, that he cannot puniſh waſte or enter for forfeiture? A tenant in tail grants his eſtate to *A.* and his heirs during the life of the tenant in tail, remainder to *B.* and his heirs during his life; both *A.* and *B.* by poſſibility may take, though the eſtates have the ſame limitation, *viz.* the life of the tenant in tail: and this is like the common caſe in ſettlements, where an eſtate is limited to huſband for life, remainder to truſtees and their heirs for the life of the huſband, for ſupporting and

1. Peer. Wms. 516.
3. Peer. Wms. 305. 372.

* [21]

* preſerving contingent remainders; and if this laſt caſe be law, it proves that a tenant in tail has ſomething in him after giving away an eſtate for his own life; and if he has any ſuch thing in him, he may grant it out of him. In *Littleton* it is ſaid,

that (*a*) where tenant in tail grants *totum ſtatum ſuum*, he has not only granted all his eſtate for life, but alſo all his right to the entail out of himſelf; and if he could do ſo, he has done it here; and then the recovery after, with ſingle voucher, cannot be good. A tenant in tail covenants (*b*) to ſtand ſeiſed to the uſe of himſelf for life, remainder to the uſe of his eldeſt ſon, no uſe ariſes to the ſon if not during the life of the father only. He owned that the *caſe of Blythman* (*c*) was in part againſt him.

(a) 10. Co. 98.

(b) Co. Lit. 331.

Cowper *contra*. And he agreed, that if the eſtate-tail was altered by the covenant, the recovery was void; otherwiſe not: and for authority for him he quoted *Bedingfield's Caſe* (*d*), the caſe of *Carey v. Dancey* (*e*), the caſe of *Alton Woods* (*f*), an *Anonymous Caſe* (*g*), in *Trinity Term*, in the third year of *Queen Elizabeth*, the caſe of *Freſhwater v. Rois* (*h*), *Wiſeman's Caſe* (*i*), and the caſe of *Hixt v. Goats* (*k*). And as to *Littleton's Caſe* (*l*), that if a tenant in tail grant *totum ſtatum ſuum*, the entail is *in abeyance*, he quoted *Plowden* (*m*), where the whole Court is to the contrary; and he ſaid, that no ancient authority did agree therewith. Beſides, though it be allowed to be law, there is a great difference between a covenant by a tenant in tail to ſtand ſeiſed, and a grant of *totum ſtatum* of him: Firſt, the covenant is to ſtand ſeiſed of the eſtate that he has to uſe, and that is an eſtate-tail; and one cannot be ſeiſed of an eſtate-tail to uſe (*n*). So that when a tenant in tail covenants to ſtand ſeiſed of his eſtate, it cannot be his eſtate-tail; then it muſt be only of the eſtate he lawfully can be ſeiſed of, and that is for his life only; and it will be void as to the eſtate-tail.

Holt, *Chief Juſtice*. How do you diſtinguiſh *a bargain and ſale* by tenant in tail to a man and his heirs from *a covenant to ſtand ſeiſed* to the uſe of him and his heirs? Both conveyances raiſe a uſe without tranſmutation of poſſeſſion. What eſtate ſhall a bargainee in fee of tenant in tail have? You ſay, an eſtate for life only. If ſo, upon the death of the iſſue in tail, the eſtate of the bargainee determines; and yet that is not ſo until the entry of the iſſue in tail; and * this does in no wiſe contradict the ſtatute *De Donis*, for the donee in tail grants the whole eſtate out of him, but the iſſue after his death may determine it; and he relied on *Seymour's Caſe* (*o*); for in that caſe, if it were determined by the death of the tenant in tail, the fine would be *a diſcontinuance*, whereas it

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(*a*) Co. Lit. 331. a.

(*b*) Hetley, 110.

(*c*) 1. And. 291. Cro. Eliz. 279.—See S. C. Yelv. 51. S. C. 1. Brownl. 193.; and that marriage is a good conſideration to raiſe a uſe, ſee Cro. Jac. 168. 2. Roll Abr. 784.

(*d*) Cro. Eliz. 895.

(*e*) Cro. Eliz. 471*.

(*f*) 2. Co. 52.

(*g*) Moor, 32. pl. 105.

(*h*) Moor, 683. pl. 940. S. C. Yelv. 51.

(*i*) 1. And. 160.

(*k*) 1. Roll. Rep. 257.

(*l*) Co. Lit. ſect 613.—And ſee Sheffield *v.* Ratcliffe, Hob. 338. and Tyrell *v.* Mead, 3. Burr. 1703.

(*m*) Plowd. 561.

(*n*) See 2. Roll. Abr. 780. Cro. Car. 401. Co. Lit. 19.

(*o*) Moor, 874. 10. Co. 95.

enured by way of confirmation of the baſe fee that paſſed by the fine; and the only difference is, that it was a defeaſible fee before the fine, and by the fine becomes an indefeaſible fee. And if tenant in tail make a feoffment, and after levy a fine, that fine binds the right of the entail, though the feoffor had it not in him at that time. It is true, a tenant in tail cannot be indefeaſibly ſeiſed to a uſe, and none can give an eſtate-tail to a uſe, but the uſe will be void: and where *Littleton* puts his caſe of *totum ſtatum ſuum*, he is to be intended where it is granted by him to another and his heirs, for otherwiſe it would not put the eſtate-tail in abeyance; and ſuch a grant without livery would make *a diſcontinuance*, and is a baſe fee, whereby the iſſue is put to his entry (*a*). In the caſe of *Stone v. Newman* (*b*), tenant in tail, reverſion to the king, commits treaſon; the queſtion was, How the king ſhould have the eſtate by the ſtatute of 26. *Hen.* 8. c. 13. or by the determination of the eſtate-tail. But the caſe of a *covenant to ſtand ſeiſed* may differ from that of *bargain and ſale*; for the right of the eſtate-tail is conveyed away in the caſe of *bargain and ſale*, but in the caſe of *covenant to ſtand ſeiſed* to his own uſe for life he is ſo already; and he cannot bind his heir without making an alteration of the eſtate-tail. If this had been a remainder to ſomebody more remote than the heir, it would be more queſtionable.

At another day, THE WHOLE COURT delivered their opinion, by HOLT, *Chief Juſtice*, that the recovery, notwithſtanding the *covenant to ſtand ſeiſed*, was good.

THE CHIEF JUSTICE ſaid, It would be reaſonably expected from them to give the reaſons of this their opinion; for though there were ſeveral authorities expreſs in the point, yet the reaſons of theſe judgments were not ſo obvious; for it has been a queſtion, Whether, if a tenant in tail, by bargain and ſale, leaſe and releaſe, or covenant to ſtand ſeiſed, convey the lands whereof he is ſeiſed in tail to another and his heirs, the eſtate ſo conveyed does actually determine (as *Littleton* ſeems to hold) upon the death of the tenant in * tail, or does continue until entry of the iſſue in tail? And WE HOLD, that notwithſtanding the covenant has not that operation here, yet if a tenant in tail bargain and ſell, leaſe and releaſe, or covenant to ſtand ſeiſed to the uſe of one of his blood in fee, that ſuch bargainee, &c. has a baſe fee, not determined by the death of tenant in tail, but continuing in the bargainee or releaſee, &c. until the iſſue in tail make an actual entry. This indeed ſeems to differ from the opinion we now give, but we will by-and-by diſtinguiſh.

And it will be worth while to know and conſider the reaſon hereof, becauſe it ſeems to contradict *Littleton*.

The FIRST REASON then is, becauſe the tenant in tail himſelf has an eſtate of inheritance in him. It is not denied, that he

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(*a*) See Walſingham's Caſe, Plowd. 561.

(*b*) Cro. Car. 427.

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had it before the ſtatute *De Donis*, and it was called *a conditional fee*; and the *ſtatute De Donis* does not make any alteration of the eſtate, ſo as to make it not an inheritance, but only fixes it ſo that there ſhall not be an alienation of it to the diſinheritance of the iſſue in tail, yet ſo as a baſe fee may be made of it (*a*). If lands be given to a villein in tail, and the lord enters, he has a baſe fee, that is, to him and his heirs, while the villein has heirs of the entail; ſo that the tenant in tail has an inheritance in him which may be turned into a baſe fee; then when he bargains and ſells, leaſes and releaſes, &c. this inheritance to another and his heirs, it is but reaſonable it ſhould paſs a baſe fee, eſpecially if nothing in the ſtatute be againſt it.

SECONDLY, The tenant in tail has the whole eſtate-tail in him, and why ſhould not he that has the whole eſtate, by bargain and ſale, leaſe and releaſe, or covenant to ſtand ſeiſed, diveſt himſelf of the whole, and put it in the bargainee? for the power of diſpoſing is an incident inſeparable to his eſtate.

THIRDLY, The turning of the eſtate-tail into a baſe fee is not at all contradictory to the ſtatute *De Donis*, nor any branch of it: that ſtatute has very ſtrong words to hinder an alienation to the prejudice of the iſſue in tail: "*Non habeant illi quibus tenementum "ſic datum fuerit ſub conditione poteſtatem alienandi tenementum ſic "datum, quo minus ad exitum illorum quibus tenementum ſic fuerit "datum remaneat poſt illorum obitum, vel ad donatorem, &c. rever- "tatur.*" Theſe words are very ſtrong, * yet we know the conſtruction that has been made upon them. If a tenant in tail make a feoffment or levy a fine, it is ſo far a prejudice to the iſſue that he ſhall be put to his action; and his entry is taken away; and he has no remedy but by *a formedon in diſcender*; and yet ſuch fine or feoffment was never taken as a breach of the ſtatute *De Donis*: ſure then it ſhall be no breach of the ſtatute to have him put to his entry to recover the eſtate. Since then it is his inheritance, and all in him, and that a power of alienation is incident to his property that he has, and that an alienation made by him to put the iſſue to entry is no breach of the ſtatute *De Donis*, I do from hence infer, that ſuch eſtate by bargain and ſale, &c. made by him to one and his heirs, is not actually determined by his death. Now as for authorities in the caſe, *Seymour's Caſe* is in point (*b*). Tenant in tail bargains and ſells to *B.* and his heirs; and the Court held, that the bargainee had a deſcendible eſtate, whereof his wife was dowable, and that by the bare bargain and ſale; and though there was a fine after, which barred the iſſue, that only excluded the iſſue in tail, but not enlarged the eſtate of the bargainee; for if he had not a fee before, the fine after could not have given it to him, for it did not work by way of enlargement of an eſtate.

(*a*) Of baſe fees, ſee Co. Lit. 18. a. See alſo 1. Atk. 2.

(*b*) 10. Co. 95.

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He quoted the *Caſe of Fines* (*a*), where it is ſaid, that *Littleton's* words (*b*) are not to be taken ſtrictly and literally: and he ſaid, it was very true that a *bargain and ſale* by a tenant in tail to one and his heirs does not work *a diſcontinuance*; but yet the eſtate paſſing by it does not determine till entry of the iſſue. And where *Littleton* ſays, that he cannot diſpoſe of more than for his life, that is, he cannot rightfully do it, ſo as to bar his iſſue, but he may convey the eſtate that ſhall continue longer, if his iſſue will not avoid it; and the *Caſe of Fines* ſays beſides, that if tenant in tail be of a rent or advowſon, and he grant all his eſtate in the rent or advowſon to one and his heirs, though he dies, the rent or eſtate in the advowſon is not thereby determined, but at the election of the iſſue in tail; for if the alienation be with warranty, and the iſſue bring *formedon*, and the alienee plead warranty with aſſets in bar, he ſhall be barred by reaſon thereof; ſo that until act be done by the iſſue in tail to determine it, the alienation continues: if it be of rent, and he bring *formedon*, collateral warranty ſhall bar him. Tenant in tail bargains and ſells (*c*) * an advowſon to another and his heirs; and the queſtion was, Whether he was remitted? It was not a doubt but a fee-ſimple paſſed by the *bargain and ſale*; indeed *Hobart* held, that the iſſue was remitted, but the other two held he was not: and if the *bargain and ſale* had been determined by the death of the iſſue, there could not have been a queſtion of the remitter; and that plainly ſhews, that the eſtate which paſſed by the *bargain and ſale* had exiſtence after the death of the tenant, though it were an advowſon. But this is no great queſtion, if you conſider the common caſe of leaſe for years made by tenant in tail, not warranted by the ſtatute of 32. *Hen.* 8. c. 28.; ſuch leaſe is not void by the death of tenant in tail, the iſſue muſt enter to avoid it; for if he do not do ſo, but accepts the rent, he is bound by the leaſe, which ſhews it was not determined by the death of the tenant in tail; for if it were, no ſubſequent acceptance of the rent would have helped it.

* [25]

Exchange of eſtates.

Another inſtance comes home to the caſe in queſtion, and that is the caſe of *an exchange*; the eſtates muſt be equal; you cannot give an *eſtate for life* in exchange for an *eſtate in fee*; you may indeed give an eſtate for life in exchange for another eſtate for life; an eſtate in fee for an eſtate in fee; that is, each party taking muſt take an eſtate of equal extent. If one give an eſtate-tail, and take a fee, it is bad. If tenant in tail and tenant in fee make an exchange, they both have fee-ſimple without more ado (*d*); for in caſe of exchange there needs no livery, but only a reciprocal execution by both parties, and this is notwithſtanding a good exchange, and a fee-ſimple paſſes from the tenant in tail, and ſhall continue until avoided by the iſſue (*e*); and here he is not put to his action to avoid it, becauſe here being no livery there was no *diſcontinuance* (*f*). Then the exchange muſt have this effect,

that

(*a*) 3. Co. 84.

(*b*) Litt. ſect. 612.

(*c*) Winch's Rep. 5.

(*d*) Co. Lit. 51.

(*e*)

(*f*) Co. Lit. 332.

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that it paſſes *a baſe fee* until avoided by his iſſue: and if the iſſue will not agree to it, he may waive the land in fee conveyed to him, and enter into the other; but if he do not do ſo, but continue in the land given, the exchange ſtands good during his life; and after his death his iſſue may avoid it by entering; and ſo on *toties quoties*. It therefore follows, that *a baſe fee* does paſs, otherwiſe it could not be a good exchange; if ſo, then there is the ſame reaſon, that when tenant in tail *bargains and ſells*, or *leaſes and releaſes*, or *covenants to ſtand ſeiſed* to uſes in fee, ſuch conveyances ſhould paſs *a baſe fee*; which * [26] ſhould continue until determined by the act of the iſſue in tail.

But to conſider the caſe in queſtion:

Notwithſtanding this be ſo, that the bargainee, releaſee, or *ceſtui que uſe*, of a covenant to ſtand ſeiſed, &c. has a baſe fee; how happens it here, that the covenant to ſtand ſeiſed, in the caſe in queſtion, does not alter the eſtate-tail, but that it ſtill continues? The reaſon is, becauſe that though the tenant in tail may make a conveyance of the eſtate in his life, which ſhall be good and binding of the eſtate-tail until avoided by the iſſue, yet any conveyance he makes to commence after his death ſhall be void, if by poſſibility it may not take effect during his life; and the eſtate by this covenant is to commence from and after the death of the tenant in tail; and the inſtance before put of the leaſe for years is apposite to this purpoſe. If a tenant in tail make a leaſe for years, not warranted by the ſtatute, to commence immediately, or which may poſſibly commence during his life, ſuch leaſe is voidable only upon his death; but if he make a leaſe to commence from and after his death, that leaſe is *ipſo facto* void by the very creation of it. And that is the book of *Dyer* (*a*), though there was one Judge of another opinion (*b*). Well then, this remainder is limited to commence from and after the death of tenant in tail; therefore it is void. But you will ſay, Here he covenants to ſtand ſeiſed to the uſe of himſelf for life, the remainder over, ſo that the eſtate to ariſe upon the covenant to ſtand ſeiſed did ariſe in his own life-time. To this they anſwer, that the covenant to ſtand ſeiſed to the uſe of one's ſelf is void, except it be for the ſake of the remainder over, and the remainder being to commence after his death is void, and the covenant to ſtand ſeiſed to his own uſe cannot be good for the ſake of a void thing. If one covenant to ſtand ſeiſed to his own uſe in tail, it had been good; for which he quoted *Carrington's Caſe* (*c*). Now what is the reaſon that ſuch eſtate is void, when it is limited to commence after the death of the tenant in tail? It is becauſe it is to commence at a time when the right of the eſtate out of which it would iſſue is in another perſon by a title paramount the conveyance, viz. *per formam doni*. A tenant in tail has an eſtate out of which he may carve out other

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(*a*) The caſe of Puttenham *v.* Puttenham, Dyer, 297. a. pl. 25.

(*b*) Cro. Jac. 457.

(*c*) Moor, 366.

eſtates,

Machil *againſt* Clerk.

eſtates, provided he does it out of the eſtate * in himſelf, ſo as to make it rightful in its creation, but otherwiſe not ; for it would be injurious to make good a leaſe or other eſtate commencing upon the right of another, whoſe title is paramount the leaſe or eſtate ſo made ; and in the principal caſe, the iſſue in tail has a title paramount the title of the remainder, by virtue of the covenant, the very minute the remainder would take effect : and that is the only true reaſon ; and therefore to make ſuch an eſtate to take effect upon the poſſeſſion of the iſſue, whoſe title is paramount, would be to make an eſtate take by wrong the very minute it has its creation. Now for caſe and judgment in the principal point there are many authorities (*a*). And the words of *Bedingfield's Caſe* (*b*) are full of the reaſon that I give. I do, you ſee, diſagree with *Littleton* ; for if you take him according to the letter, it contradicts the *Caſe of Fines* (*c*) ; and if I have contradicted *Littleton*, I have done it upon great authority, *viz.* the *Caſe of Fines*, and *Hob.* 319. where he ſays, "the law abhors *abeyance*, and never ſuffers it but in caſe of neceſſity." And he took notice of the caſe in 1. *Saund.* 260. in the common pleas, which authority, he ſaid, was againſt him upon the firſt matter, *viz.* FIRST, If a tenant in tail make a bargain and ſale, the bargainee has no more, ſays that book, but for life of bargainor, though the *habendum* were to bargainee and his heirs ; and ſo they then held it. But I muſt take the liberty to diſagree with them, becauſe I have the authority of *Seymour's* and other caſes with me ; for we may with as much decency deny their authority, as they have denied that of *Seymour's Caſe* ; for a fine to a ſtranger ſhall extinguiſh the right of an intail, but cannot enlarge any eſtate before made out of the eſtate-tail ; ſo that if the eſtate which the tenant in tail makes may poſſibly commence during his life, ſuch eſtate ſhall, after his death, continue until avoided by the iſſue ; but if it cannot commence until after death of iſſue, it is abſolutely void.—SECONDLY, If a tenant in tail covenant to ſtand ſeiſed to the uſe of *J. S.* who is of his blood, for his life, with remainder over to another, and dies before the remainder happens, yet * the remainder is *[28] good until it be avoided by actual entry of the iſſue ; otherwiſe it will exiſt after the death of the iſſue, becauſe the eſtate for life had taken effect ; and the remainder might have taken effect during the life of the tenant.—THIRDLY, If a tenant in tail make a leaſe and releaſe to the uſe of himſelf for life, with remainder over to another, the remainder over is good until avoided, though it be to commence after the death of the iſſue in tail ; and the reaſon is, becauſe it iſſues out of the eſtate by leaſe and releaſe, which is good until avoided by entry. He ſaid, the grounds he went upon were his own, but his Brothers concurred with him in the main.

And the judgment in the common pleas was affirmed (*d*).

(*a*) 2. Co. 52. Yelv. 51. Moor, 883. 3. Lev. 291.

(*b*) Cro. Eliz. 895.

(*c*) 3. Co. 84.

(*d*) See the caſe of Goodright on the Demiſe of Tyrill *v.* Mead and Wilſon, 3. Burr. 1703. Stapleton *v.* Stapleton, 1. Atk. 8.

The

Caſe 34.

The Queen *againſt* Rogers.

The *common ſerjeant* may file an information in the mayor's court.

AN INFORMATION was exhibited againſt *Rogers* in the name of THE COMMON SERJEANT of the *City of London* in THE MAYOR'S COURT, grounded upon a *cuſtom in London* to puniſh in that manner any that ſhould give opprobrious or affronting language to any of their aldermen.

To ſpeak contemptuouſly to an alderman, while holding a wardmote, is not indictable.

S. C. 2. Salk. 425.
S. C. Holt, 331.
S. C. 2. Ld. Ray. 777.
Poſt. 91.
1. Mod. 35.
3. Mod. 139.
6. Mod. 124.
Jones, 229.
3. Cro. 78.
Moor, 347.
2. Lev. 200.
1. Vent. 16.
2. Sid. 65.

The information ſet forth another cuſtom, for holding A LEET on ſuch a day yearly in the ſeveral wards; that *Sir Robert Jeffreys* was ſteward of ſuch a leet in ſuch a ward, and ſat in the ſaid court, held at, &c. as ſteward; that the defendant made an aſſault upon him, and contemptuouſly ſaid, "*He has as much to do* "*there as I have*; *he miſtakes himſelf, for he is not now among* "*his Bridewell birds, and the next year he ſhall keep his court* "*there* (a)."

This matter being brought up by *habeas corpus*,

IT WAS MOVED that the defendant ſhould be diſcharged. There is nothing in the words for which an indictment lies, except *the aſſault*; for at moſt they are but words of diſreſpect, for which there is no other remedy than to bind the party to *good behaviour*, or for want of ſureties to commit him, and that may be lawfully done in caſe of diſreſpectful words to A MAGISTRATE; or if one in a court behave himſelf inſolently, he may be committed immediately as for a contempt.

*[29]

Beſides it was ſaid, there was nothing in the words but what was true. * The defendant was a ſuitor, therefore he was bound to be there, and he had a right to be there. The ſteward was not among *Bridewell birds*; and as to "he ſhall not hold court there "next year," he had a right to hinder it, for the court was held in THE CHURCH, and he was churchwarden.

HOLT, *Chief Juſtice*. It may be that they have *a cuſtom* to puniſh by INFORMATION for reaſonable cauſe, but it will be a great queſtion, Whether the cauſe here be ſuch? and, Whether there may be a cuſtom to make words more criminal than the common law makes them? This is not like the caſe of calling a woman "a whore," which is puniſhable there; though not at common law; for that is grounded upon another cuſtom of puniſhing fornication there, which is not puniſhable anywhe e elſe. And he ſaid, that a contemptuous carriage and behaviour to a magiſtrate, was a breach of the *good behaviour*, and he to whom ſuch affront is offered, may bind him to his *good behaviour*; or, if he have no ſureties, commit him until he find ſome: ſo in this court, if a witneſs be inſolent, we may commit him for the immediate contempt, or bind him to his good behaviour; but we cannot indict him for it: and that is the courſe according to the common law of *England*: And a binding to good behaviour is not by way of puniſhment, but it is to ſhew that when one has broke the good behaviour, he is not to be any more truſted. Giving a man *the lie* in *Weſtminſter-Hall*, or in any great concourſe of people, is a breach of the good behaviour.

(a) *Sir Robert Jefferies* was governor of *Bridewell*, and alſo AN ALDERMAN of the city of *London*. He held a wardmote in the church of the pariſh of which the defendant was then churchwarden. The defendant made *an aſſault* upon him, and ſaid, "If I am churchwarden next year, "you ſhall aſk my leave to keep your "wardmote here;" upon which *Sir Robert Jefferies* called him "a rogue and "a raſcal;" and the defendant replied, "I have as much to do here as you; "you think, ſure, you are among your "*Bridewell birds*; you are miſtaken." S. C. 2. Ld. Ray. 777.

1. Sid. 144.

1. Lev. 107 and ſee 1. Hawk. P. C. 7. edit. ch. 21. ſ. 9.

The Court at laſt awarded *a procedendo* as to *the aſſault*, for they may have a cuſtom to puniſh by information, ſuch as aſſault the magiſtrate.

Vide 1. Vent. 327.

Shirly *againſt* Right.

Caſe 35.

A CAPIAS AD SATISFACIENDUM iſſued upon a judgment after a year and a day, without a *ſcire facias*, and the ſheriff executed it, and afterwards ſuffered him to eſcape. On an action for the eſcape,

The queſtion was, Whether the ſheriff could take advantage of this in bar of the action?

And that he could not, the authorities in the margin were quoted (*a*).

* Mountague offered a diverſity, that where the error appears on the face of the writ itſelf, the ſheriff is not bound to execute it, and by conſequence if he do execute it, he may let the party go away again; as if a *capias ad reſpondendum* be taken out in *Trinity Term*, returnable in *Hilary Term*, for it ought to be returnable the next Term (*b*).

A *capias ad ſatisfaciendum* is not void, although a full Term intervene between the *teſte* and the *return*; and therefore if the ſheriff execute ſuch a writ, and the priſoner eſcape, he cannot take advantage of this on an action of debt againſt him for the eſcape.

* [30]

Holt, *Chief Juſtice*. In *real actions* if there come an *alias ſummons*, they give an intermediate Term before the return of it, becauſe of the ſtatute of *Dies in Banco* (*c*): ſo in a writ of dower (*d*). But in *perſonal actions*, where a *capias ad reſpondendum* lies, it muſt be continued down from one Term to another; and if ſuch proceſs iſſue out of this court in *Trinity Term*, returnable in *Hilary Term*, the cauſe is thereby out of court, for if it be not continued in every Term it is gone; and if a ſheriff ſhould take

S. C. 3. Danv. 121.
S. C. 1. Salk. 273.
S. C. Holt, 761.
S. C. 2. Ld. Ray. 775.
Poſt. 64.
Comb. 250.

Ld. Ray. 241. 399. 424. 708. Stra. 901. 951. 726. 1226.

(*a*) Mo. 274. 2. Saund. 100. Dyer, 175. 21. *Hen.* 7. 16. Poph. 205. 3. Cro 893. 1. Leon. 30. 3. Cro. 271. 288. 436. 2. Rol. Ab. 560. 21. *Edw.* 4. 23. 8. Co. 121.

(*b*) *Vide* 2. Keb. 261. 2. Rol. Rep. 442. 1. Rol. Abr. 484. Sid. 337.

(*c*) The ſtatute of *Dies in Banco* was made in the fifty-firſt year of *Henry the Third*.

(*d*) See the ſtatute 34. *Hen.* 8. c. 21. for abridging Trinity Term; and 16. & 17. *Car.* 1. c. 6. for abridging Michaelmas Term.

SHIRLY *againſt* RIGHT.

one by ſuch proceſs, and let him go, he would not be liable, becauſe the cauſe is out of court. But here is an execution returnable at a ſecond Term. Where is the miſchief in this caſe? For the ſheriff is to detain him in execution, and he has no opportunity at the return of the writ to diſcharge himſelf. The ſheriff is to keep him until the Court call for him at the return of the writ; and then a *habeas corpus* goes to bring him in, and he is delivered to the priſon of the court; and if the Court think it not convenient to have him the next Term, but will ſkip a Term, where is the harm of that? For let the return be when it will, he is to be kept in cuſtody both before and after it: but upon a *capias ad reſpondendum* it is otherwiſe; for there, by putting in bail, the proceſs is determined, and by a long return the defendant is hindered from coming to make an end, and diſcharge himſelf of the action. But it will not hold to ſay, that where the ſheriff is excuſed by the proceſs, there he ſhall be liable to an action of eſcape, for an eſcape of one taken by virtue of that proceſs; for if a writ be *teſted* out of Term, yet he may ſafely execute it, but the plaintiff that ſued it out cannot take advantage of ſuch writ: and this was *Sir John Lenthal's Caſe (a)*: ſo he ſaid, that in the principal caſe, this at moſt was but an erroneous matter.

1. Saund. 161.
1. Lev. 254.
2. Lev. 109.

And PER CURIAM, judgment was given for the plaintiff *niſi*.

(a) 2. Danv. Abr. 123. 2. Keb. 384. 3. Keb. 487. 2. Lev. 109. 1. Freem. 198.

*[31]

Caſe 36.

* Anonymous.

Prohibition *quoad*.
Poſt. 98. 125. 113. 137. 148.

A LIBEL was brought in the ſpiritual court, for that *J. S.* being the parſon of ſuch a church, did make himſelf drunk at THE SACRAMENT, and that he was a whore-maſter.

Ld. Ray. 123. 138. 212. 236. 423. 512. 856. 1205. 1507.
Fitzg. 189.
Comy. 25. 309.

And upon a ſuggeſtion, that the ſpiritual court would proceed to a deprivation, and that the benefice was a donative, a *prohibition* was granted *quoad* the ſuing in order to deprive, but not *quoad* the other matter.

Stra. 715. 776.

Caſe 37.

George *againſt* Pierce.

A witneſs ſaying declared that he received a guinea to conceal the truth is no ground for a new trial.
Poſt. 156.

IN order to a new trial, an affidavit was read, that one of the witneſſes had declared that he had got a guinea to ſtifle the truth.

GOULD, *Juſtice*. An affidavit of him who had the guinea would be ſomething, but a witneſs ſaying ſo is nothing. A witneſs's laying a wager in the cauſe is no hindrance to his being a witneſs, for the other has an intereſt in his evidence, which he cannot deprive him of.

1. Stra. 643. Sayer, 100. 1. Term Rep. 11. Tidd's Practice, 606.

Anonymous.

Anonymous.

Caſe 38.

HOLT, *Chief Juſtice.* If AN EXECUTOR *de ſon tort* deliver the goods to the adminiſtrator before action brought, he may plead *plene adminiſtravit.*

SECONDLY, If adminiſtration be firſt granted, and then another take the goods, he is not thereby EXECUTOR *de ſon tort.*

Executor *de ſon tort.*

1. Salk. 113.
1. Show. 242.
3. Salk. 161.
3. Lev. 34.
Ld. Ray. 661.
1216.
Stra. 1106.

Anonymous.

Caſe 39.

IF one be brought up upon *an attachment*, you can have no more than his anſwer upon interrogatories, and if he forſwear himſelf, he is ſubject to a proſecution of perjury.

Interrogatories on an attachment.

Cro. Car. 89.

6. Mod. 43. 1. Stra. 444. 4. Burr. 2106. 2129. Tidd's Practice, 256. 3. Hawk. P. C. 273.

Anonymous.

Caſe 40.

HOLT, *Chief Juſtice.* The owners of THE GATE-HOUSE priſon have no charter to ſue a commiſſion of *gaol-delivery*, and it is hard to maintain a right to a gaol without ſuch a liberty. There is an act of parliament, that all felons ſhall be committed to the county-gaol; the meaning of which is, if there be not a franchiſe and power to ſue for a *gaol-delivery:* and ſuch ſuit muſt be made in chancery.

Wherever there is a gaol, there muſt be a right of gaol delivery.

* [32]

* The Queen *againſt* Maſon.

Caſe 41.

AN INQUISITION found that *Ford* had forfeited his office of WARDEN OF THE FLEET, upon which it was ſeized into the queen's hands. The defendant, *Maſon*, brought a *monſtrans de droit* in chancery on the inquiſition, and ſet forth a title, and traverſed *Ford's* being ſeiſed; ſo that by conſequence he could not forfeit the office. To this THE ATTORNEY-GENERAL demurred. The cauſe was brought into the court of king's bench by THE CHANCELLOR.

Poſſeſſion on an inquiſition.

S. C. 2. Salk. 447.
1. Salk. 441.
395.
5. Mod. 57.

It appeared that the title which *Maſon* had ſet forth was a bad one; but *Maſon* as *amicus Curiæ* ſtill inſiſted that *Ford* had not forfeited the office, and therefore that the queen had no title.

It was urged that no judgment could be given for the queen, and that the whole record being here, it muſt be affirmed or ſubverted by the Court.

HOLT, *Chief Juſtice.* When a man is put out of poſſeſſion by virtue of an inquiſition returned for THE QUEEN, and another comes and pleads his right, that is a diſtinct record from the inquiſition; and ſo if another come and plead his right, that is another diſtinct record. And if demurrer be to all, then it is determined

The Queen *against* **Mason.**

there, or may be ſent into this court to be argued and determined; but if iſſue be joined in it, then the way is to award a *venire facias* out of chancery, returnable at a day certain in the queen's bench, and the record is delivered hither *per manus* of THE CHANCELLOR, &c. to be here at the day of the return of the *venire facias*; but the inquiſition is never ſent hither; but the party comes in chancery, and complains of his being aggrieved by the inquiſition, and prays that he may be admitted to ſhew his right, and plead againſt the inquiſition; and that is a *monſtrans de droit* (*a*); and all the operation of the inquiſition is to make title for the king, and the party comes in as plaintiff, and either traverſes it, or ſhews his right conſiſtent with it. And if he will traverſe it, he muſt ſhew title in himſelf. The caſe of *Jefferſon v. Dawſon* was part on demurrer and part on iſſue, and if there be *a miſpleader* and *a repleader* awarded, that muſt be in this court; and where there is iſſue and demurrer, and the party will not proceed on the demurrer, the Court will give judgment on the demurrer; and though ſome books have a ſaying, that a record may be ſent out of chancery hither, even upon demurrer, I would fain ſee where it has been done (*b*).

2. Saund. 252.
1. Mod. 94.
1. Lev. 209.

(*a*) See *Lord Somers'* argument in the *Bankers' Caſe*, Skin. 601.

(*b*) THE COURT held, that the record of the inquiſition itſelf was not before the Court, but only the record of the *monſtrans de droit*; but that although the record of the inquiſition was not ſo before the Court as that they could quaſh it with reſpect to all perſons, and thereby deprive them of ſhewing their right in chancery where the record is filed, yet as the *monſtrans de droit* recited the inquiſition, and concluded *prout patet per recordum inquiſitionis in filaciis curiæ cancellariæ*, it was before the Court with reſpect to the plaintiff in the *monſtrans de droit*; ſo that if thereby a title appeared for him the Court might give judgment, and, if the inquiſition falſified be ſet aſide, ſo far as to make way for the party's right, and if the party's right can be collected from the inquiſition, it ſhall be affirmed by the judgment.—But THE COURT alſo held, that if the party ſuing a *monſtrans de droit* appear to have no right, he cannot mend his caſe by taking exceptions to the inquiſition as *amicus Curiæ*, although it appear by theſe exceptions that the queen has no right, or that the right is in another; for that a party ſuing a *monſtrans de droit* is a plaintiff and may be nonſuited, and if he fail in his title he is gone as effectually as if he were nonſuited, and no judgment need be given for the queen. Accordingly judgment was given in the preſent caſe, that *Maſon* ſhould take nothing by his writ. S. C. 2. Salk. 448.

Caſe 42.

Foſter's Caſe.

A plaintiff may be nonproſſed for not declaring, though the defendant appeared voluntarily.

ONE took out a writ, and the defendant voluntarily appeared, and gave notice to the plaintiff's attorney of bail filed; the plaintiff did not declare; the defendant ſigned a *non proſeq.* for want of a declaration (*a*).

And HOLT, *Chief Juſtice*, held it well enough.

S. C. 12. Mod. 448. S. C. 1. Salk. 455. Tidd's Pract. 235.

(*a*) See the ſtatute 13. *Car.* 2. ſt. 2. c. 2. ſ. 3.

* Gay *againſt* Croſs.

Caſe 43.

THE PLAINTIFF brought an action on the caſe for a falſe return to *a mandamus*, to ſwear him COMMON-COUNCIL-MAN for the borough of *Totneſs*.

By charter from *Queen Elizabeth* the manner of their election was chalked out for them; and a uſage was given in evidence to a jury at THE BAR, that the election had gone quite contrary, which uſage was allowed to be good evidence of a bye-law whereupon it was founded:

So the Counſel on both ſides conſented to have it found ſpecially, and to have it determined by THE COURT, Whether ſuch a bye-law, and a long uſage purſuant to it, could alter the direction, or rather annihilate the direction of the charter?

The jury having given their verdict in private over-night, ſaid, that they had found the matter ſpecially, and the next day in court delivered their verdict for the defendant generally, and would give no reaſon for it, nor be moved to depart from it.

Formerly the Court would not grant a new trial after a trial at bar.

S. C. Holt, 703. S. C. 2. Salk. 650. Poſt. 83. 156. 2. Show. 179. 217. Ld. Ray. 126. 848. 959. 989. 1004.] Comy. 86. Stra. 314. 462. 1. Bl. Rep. 532. Tidd's Pract. 604.

And hereupon *a new trial* was moved for, and the caſe of *Wood v. Gunſton*, in *Stiles* (*a*), and a caſe of the *Welſh Drovers* (*b*) were quoted for new trials after a TRIAL AT BAR.

And though THE COURT were very much diſſatisfied with the jury, and HOLT, *Chief Juſtice*, ſaid he never had known the like, and that he would have but little value for the verdict of a jury that would not, at a Judge's deſire, declare the reaſon which had induced them; and that as the Judges do publicly declare the reaſons of their judgments, and thereby expoſe themſelves to the cenſures of all that be learned in the law, and yet there is no law obliges them to it, but it is for public ſatisfaction; ſo the jury ought for the ſame reaſon, to declare the reaſon of their verdict, when required by the Court; yet notwithſtanding all this, it being a trial at bar,

THE COURT would not grant a new trial (*c*).

(*a*) Stiles, 462.

(*b*)

(*c*) But ſee Stiles, 466. 1. Stra. 584. 2. Ld. Raym. 1358. 2. Stra. 1105. 1. Burr. 395. 4. Burr. 1986. 2. Bl. Rep. 698. 3. Wilſ. 146. 338. New trials granted after a trial at bar.

Rice *againſt* Serjeant.

Caſe 44.

A MAN having obtained a judgment for a juſt debt againſt *A.* took out a *fieri facias* and got the ſheriff to ſeize the goods, but would not let him proceed farther; but ſuffered the goods to remain in the cuſtody of *A.* the debtor. *B.* who had alſo ob-

Goods, though *ſeized* in execution, if ſuffered to remain in the cuſtody of the defendant, may be taken at the ſuit of another creditor.—Poſt. 118. 6. Mod. 184. 191. Ld. Ray. 555. 1072. 2. Vern. 239. Comy. 35. Stra. 226. 461. 515.

tained a judgment againſt *A.* for a juſt debt, took out a *fieri facias.*

The queſtion was, Whether he could ſeize upon the ſame * goods?

* [38]

And PER CURIAM he may, for the former was a fraudulent execution (*a*), and the ſheriff might very well return *nulla bona* upon the firſt execution.

(*a*) See Stephen *v.* Sole, 1. Vezey, 352. Bourn *v.* Dodſon, 1. Atk. 154. Bamford *v.* Baron, 2. Term Rep. 594. Edwards *v.* Harben, 2. Term Rep. 587. Mace *v.* Cadell, Cowp. 232. Cook's B. L. 417.

Caſe 45. Smith *againſt* Villars.

If the claimant of an *earldom* be arreſted by the addition of *gentleman*; the Court, to prevent prejudice to his claim, will allow him to give bail without joining in the recognizance.

S. C. 1. Salk. 3. 6. Mod. 80. Ld. Ray. 64. 249.

THE DEFENDANT pretending to be *Earl of Buckingham*, and being arreſted by the name of *J. Villars, Arm.* upon motion concerning bail to be put in by him;

THE COURT ſaid, that he might without prejudice put in bail by the name by which he was arreſted; becauſe, being a civil action, he need not join in the recognizance, as the cuſtom is in criminal cauſes. And that in the caſe of the *Earl of Banbury*, who was indicted by the name of *George Knowles, Eſq.* becauſe, by the courſe of the Court, he ought to join in the recognizance, and if he had entered into one by the name of *George Knowles*, it would be an eſtoppel upon him, therefore the Court indulged him to bring others who gave bail for him by the name of *George Knowles, Eſq.* for their act could not conclude him.

1. Stra. 205. 2. Stra. 811. 1. Bac. Abr. " Abatement" (D).

Caſe 46. The Queen *againſt* The Mayor of Carliſle.

Attachment. Ante, 1.

AN ATTACHMENT granted againſt him for proceeding after a *certiorari* delivered.

1. Salk. 9. 148. 201. 396. Poſt. 84. Ld. Ray. 469. 609. 766. 1102. Stra. 63.

Caſe 47. Rule of Court.

Proceedings are not ſtayed by a reference.

PER CURIAM. A ſubmiſſion of a matter to a reference is no ſtay of ſuit for that matter, if it is not particularly ſo agreed on.

S. C. 2. Ld. Ray. 789. 1. Mod. 24. Cromp. Pract. 263.

Caſe 48. Anonymous.

Copyhold.

HOLT, *Chief Juſtice.* A copyhold eſtate is not to be ſeized upon a recognizance.

Ld. Ray. 996. 1000.

Anonymous. Caſe 49.

PER HOLT, *Chief Juſtice.* If a deed has no date, or an impoſſible date, you may declare, that the defendant by his deed on ſuch a day and year did ſo and ſo, and upon *oyer* there will be no variance; but if you ſay that by his deed of ſuch a date, or bearing date ſo and ſo, and upon *oyer* the deed has no date, or an impoſſible one, it will be a variance.

Date.
1. Salk. 76.
2. Salk. 463.
498.
6. Mod. 244.
Ld. Ray. 336.
354. 403. 703.
791. 1242. Stra. 1186. 1198 1241.

Anonymous. Caſe 50.

NOTE, It was ſtrongly inſtanced by LUTWICHE in the common pleas, that *a tolt* does not lie in a perſonal action.

And THE COURT ſeemed to be of the ſame opinion.

Tolt.

* Memorandum. Caſe 51.

BY HOLT, *Chief Juſtice.* It ſhall be a rule for the future, that upon the moving of indictments here by *certiorari*, we will not hear a motion in arreſt of judgment until the defendant has appeared.

Certiorari.
Ante, 10.
1. Salk. 78.
Stra. 1088.

The Queen *againſt* Blacket and Robinſon. Caſe 52.

LEAVE was given to file an information *pro malegeſturâ* againſt them, for procuring a gentleman's ſon to marry a woman of infamous reputation (*a*).

Information.
Caſes T. T. 58.
Gilb E. R. 172.
1. Peer Wms.
705. 2. Peer Wms. 111. 561. 3. Peer Wms. 116. Stra. 1107.

Brooks *againſt* Stroud. Caſe 53.

TWO were made executors, and an action brought by them. They ſet forth, that they were made executors, and that they both proved the will, and, by THE PROBATE produced, it appeared that one only proved it; and the matter being pleaded in *abatement*, the plaintiff had judgment *ouſter*, and the Year-Book 21. *Hen.* 4. was quoted; Two were made executors; one of them proved the will, they both have the right in them; and the other cannot refuſe until after the death of him that proved, but then he may. If one of them is ſevered, the other ſhall go on.

If two executors ſue, it cannot be pleaded in abatement that only one of them proved the will.
S. C. 1. Salk. 3.
Yelv. 130.
2. Saund. 213.
Swinb. 358.
Went. 59. Dyer, 160. Prec. Ch. 173. Caſes T. T. 127. Stra. 20.

(*a*) See Rex *v.* Twiſelden, 1. Sid. 387. 1. Lev. 257. Rex *v.* Serles and Others, Cro. Car. 557. Rex *v.* Thorp and Others, 5 Mod. 221. See alſo 4. Hawk. P. C. 85. 1. Black. 386. 1 Burr. 606.

Caſe 54.

Duke of Norfolk's Caſe.

If a plaintiff die after verdict, yet judgment may be entered within two Terms.
S. C. 1. Salk. 401.
S. C. Holt, 400.
Tidd's Pract. 500. 695.

A VERDICT was given in *Eaſter Term*; and before the judgment was entered the plaintiff died.

Per HOLT, *Chief Juſtice.* That ſhall not hinder the judgment from being entered, provided, ſays the ſtatute, it be within two Terms after. And as to 29. *Car.* 2. c. 3. the ſtatute of Frauds and Perjuries, that only requires the time of ſigning judgment ſhould be entered on THE ROLL, and that is only for the benefit of purchaſers; for if judgment be ſigned in Vacation, yet it is entered as of the Term before; and none but a purchaſer ſhall be admitted to ſay, that it was ſigned at any other time; and it is the courſe of the Court to let all things be done in the Vacation, as of the Term before.

Caſe 55.

Anonymous.

Ejectment.
Ld. Ray. 312. 341. 404. 737. 830.

BY HOLT, *Chief Juſtice.* In caſe of tenants in common, there muſt be an actual *ouſter* of one by the other, or elſe he ſhall not be compelled to confeſs leaſe, entry, and *ouſter*.

Comy. 113. Stra. 531. 960. 1180.

* [40]

Caſe 56.

* Anonymous.

A ſecond *ſcire facias* muſt be *teſted* on the return of the firſt.

BY THE COURT. In a *ſcire facias* againſt bail, the ſecond muſt be *teſted* on the return of the firſt, and both cannot be taken away at a time; there ought to be fifteen days incluſive between the *teſte* of the firſt and return of the ſecond.

Poſt. 138. 196. Ld. Ray. 1179. 1259. 1467. See alſo the laſt point in the caſe of Atwood *v.* Burr, ante, 3. and the caſes there cited.

Caſe 57.

Anonymous.

Information lies for gaming.
2. Roll. Abr. 78.
Comb. 16.

AN INFORMATION was filed againſt one for drawing in ſeveral to play with him for money, and putting *falſe dice* upon them. *Ex motione* SALKELD.

1. Salk. 379. 1. Mod. 42. 2. Hawk. P. C. 113. 4. Hawk. 85. Ld. Ray. 865.

Caſe 58.

The Queen *againſt* Templeman.

After pleading *guilty* to an indictment, the defendant may give evidence that *juſtifies the fact in mitigation of puniſhment.*

AFTER pleading *guilty* to an indictment, you may give any-thing in evidence that juſtifies the fact, or proves him *not guilty* of the fact; for the entry is *non vult contendere cum dominâ reginâ, ſed ponit ſe in gratiam Curiæ.* And it is not like the caſe where one is found guilty by verdict.

—S. C. 3. Danv. 253. S. C. 1. Salk. 55. Stra. 872.

Smith *againſt* Angel.

Caſe 59.

Eaſter Term, 13. *Will.* 3. *Roll* 325.

DEBT by the plaintiff and his wife as executors of *Matthew Field*, againſt the defendant, as ſon and heir of *Juſtinian Abel*, upon ſeveral obligations by which the father bound himſelf and his heirs, upon ſeveral conditions, &c.

In debt on bond againſt an heir, if the defendant has no aſſets by deſcent, except a reverſion after a leaſe for years and extinction of dower allowed by chancery to the anceſtor's wife, the plaintiff ſhall have a general judgment *de bonis propriis* againſt the defendant.

The defendant confeſſes the action, and that the bonds are the deeds of his anceſtors; but ſays, that his father was ſeiſed in fee of four parts in ſix of ſuch a cloſe, and of three parts in four of another cloſe; and of three parts in four of a meſſuage, and the iſſues and profits thereof; that the ſaid obligor in his life-time by his indenture bearing date, &c. a counterpart whereof he produced in court, demiſed the ſaid parts and ſhares to *Henry Greenwood* for five hundred years; by virtue whereof he entered, and was poſſeſſed for the term aforeſaid; that the father died ſeiſed of the reverſion which deſcended to the defendant; that he was thereof ſeiſed, and that at the time of exhibiting the bill, or at any time ſince, he had not any land or tenements by hereditary deſcent, beſides the reverſion of the tenements aforeſaid; that after the death of his father, and the ſaid deſcent, in the ninth year of *William the Third*, there was a ſuit in chancery between *Edward Thompſon* and others and *Elizabeth Angel*, wife of the defendant's father, and the defendant, in which ſuit it was decreed and adjudged in the ſaid court, * that *Elizabeth Angel* ſhould have one third part of the premiſes for her life for her dower, by virtue whereof the ſaid *Elizabeth Angel* was ſeiſed of a third part of the premiſes for her life, and ſo prays judgment whether he, as ſon and heir to his father, ought to be charged beſide the reverſion of the term aforeſaid and of the third part whereof the wife was endowed when it ſhould fall.

* [41]

S. C. 1. Salk. 354.
S. C. 2. Ld. Ray. 783.
1. Keb. 156.
3. Salk. 157.]
178.
2. Mod. 50.
Comb. 162.
Ld. Ray. 53.
728.
1. Vern. 93.
188. 234. 282.
348. 419. 429.
471.
2. Vern. 61.
Prec. Ch. 39.
232.
3. Peer Wms. 9.
166. 217. 330.
341. 401.
Stra. 665. 879.
1028. 1270.
3. Bac. Abr. 33.
4. Bac. Abr. 69.

The plaintiff craves *oyer* of the leaſe; by which it appeared, that in conſideration of three hundred pounds he had demiſed the premiſes for five hundred years, provided that if the father, or his executors or adminiſtrators, paid fifty pounds a-year to *Henry Greenwood* during his life, then the eſtate ſhould ceaſe; AND REPLIES, that the defendant after the death of his father entered, and was thereof ſeiſed, and took the profits, beſides the third part to his wife, which would be ſufficient to pay the fifty pounds a-year; and ſo prays judgment.

The defendant rejoins and ſays, that he did not enter *modo et formâ*; and concludes to the country.

The plaintiff demurrs.

HOLT, *Chief Juſtice*, delivered the opinion of THE COURT, after ſeveral arguments at THE BAR, and ſaid, It was not doubted, but that the plaintiff ought to have judgment; but the queſtion was, what judgment ought to be given him; whether a ſpecial one, to have execution of the lands and tenements mentioned in the plea, or generally againſt him as heir to his anceſtor? We have conſidered both; and WE ARE OF OPINION, that there ought to be a general judgment againſt the defendant, by which his body, his goods, his lands which are not aſſets, may be taken in execution.

Two things are conſiderable herein.

FIRST, The pleading of a reverſion of a term for years made by his anceſtors; whether pleading a leaſe for years, be good and allowable in a defendant ſued as heir to his anceſtors? and whether that be ſufficient to hinder the plaintiff from immediate execution?

SECONDLY, Whether pleading of an aſſignment of dower to the wife, and that he had a reverſion expectant thereupon by court of chancery, be good?

As to THE FIRST, the caſe is this: A man by bond obliges himſelf and his heirs to pay ſo much money, then makes a leaſe for years and dies, whereby the reverſion in fee deſcends to his heir; * [42] the queſtion is, Whether the heir may * plead this leaſe for years in bar of execution, or confeſs aſſets, without taking notice of the term for years? There are indeed ſome few precedents, and I have known it practiſed where it was pleaded; but I am not willing to deliver my opinion as to that point now, becauſe the caſe does not require it; but it ſeems to me, that it ſhould not be matter lying in the mouth of the defendant to plead any ſuch matter; for he might without danger confeſs that he had *aſſets*, without taking any notice of the leaſe. To have the freehold and inheritance of the eſtate deſcend to him, makes complete aſſets, and that he has from his anceſtors; therefore he has complete aſſets. If it were a leaſe for life, made by the anceſtor, and only a reverſion in fee expectant thereupon had deſcended from the anceſtor, that would not be aſſets in poſſeſſion, but a reverſion in fee expectant upon an eſtate for life; and there he had not a freehold, as here he had, but a reverſion expectant upon a freehold. Beſides, it appears by the *Statute of Gloceſter*, and the 21. *Hen.* 8. c. 15. that the common law did not much regard eſtates for years, for ſuch eſtate was ſubject altogether to the will of him in reverſion; for if he in reverſion had ſuffered a recovery by colluſion or default, the termor was bound by it, and his term was loſt without remedy, as appears by the comment of my *Lord Coke* upon that ſtatute (*a*), even after the *Statute of Gloceſter*, which gave a termor for years liberty to come and falſify a recovery had againſt tenant in reverſion. Again, leaſes for years becoming more conſiderable, and yet more precarious, becauſe of the frequency of common recoveries, which now became a common conveyance, the ſtatute of

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(*a*) 2. Inſt. 321. Co. Lit. 46.

21. *Hen.* 8. c, 15. became a further remedy for termors; yet notwithſtanding theſe ſtatutes, it never lay in the mouth of a tenant to *a præcipe* to plead a leaſe for years, or to ſtop execution upon any ſuch plea. If *an aſſize* be brought againſt a tenant for life, he cannot ſay there is a leaſe for years precedent to his right, though the tenant for years himſelf may falſify a recovery againſt him in reverſion: ſo the ſame reaſon holds in this caſe; for the obligation of the father attaches upon the land, being *aſſets* in the heir's hands. On a *ſcire facias* grounded upon a fine to execute a fine (*a*), whereby lands were conveyed by grant and render to one and his heirs in tail, the tenant pleaded a warranty of the anceſtors of the plaintiff, and that *aſſets* deſcended to him; the plaintiff replied that the *aſſets* that did deſcend were extended for the king's debt; and it was not held a good plea, becauſe the freehold and inheritance did deſcend, and * they were preſent *aſſets*. If it be ſo in the caſe of a *real* * [43] *lien* ſo as to bind the land in caſe of warranty, ſurely the ſame reaſon, where the heir is charged upon account of aſſets, in an action of debt upon the lien of the anceſtor. The books ſay he might plead a leaſe for years as to the value of the *aſſets*, for *aſſets* in a real action is no more than *aſſets* are worth; ſo that if plaintiff is not to have it diſcharged of the term for years, the reverſion is leſs worth. Then if it be a good plea, the conſequence is, that an immediate *extendi facias* do go to appraiſe the reverſion upon inquiſition taken, and then to deliver it to the plaintiff to enter into it, when it falls in poſſeſſion: As in *Dyer*, 246. Debt againſt an heir who pleaded he had nothing but a reverſion expectant upon an eſtate for life; the plaintiff joined with him and took judgment upon the confeſſion, and to have execution when reverſion falls in poſſeſſion; ſo if this be a good plea, the ſame muſt be done here. In *Hern* (*b*) there is a precedent of this matter. There is no miſchief to him in remainder, nor to the leſſee, for he will defend his poſſeſſion in ejectment by virtue of his leaſe. But we do not give any concluſive opinion in this matter.

SECOND POINT. The dower to the wife is ill pleaded, for it is Ld. Ray. 438. 785.1293.1384. not ſaid that the wife was endowed by metes and bounds, nor that THE LORD CHANCELLOR did endow her, but that there was a decree in chancery, by virtue whereof ſhe was endowed; and that is not to be underſtood; for THE CHANCELLOR has nothing to do in aſſigning of dower, but in caſe of lands holden of the king in chivalry, and the heir's being in wardſhip to the king; and in ſuch caſe, when ſhe came in as his wife, and prayed to be endowed, the king's title appearing on record, a record was neceſſary to find her title; and ſo an inquiſition was taken, and upon her being found thereby to be his wife, THE CHANCELLOR uſed to aſſign her dower, or to award a commiſſion for it (*c*). And this was the legal way for the wife to recover her dower of lands in the king's hands, by the reaſon of the wardſhip of the heir; for as every

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(*a*) Bro. Abr. "Aſſets" 9. Year-Book 43. *Edw.* 3. pl.

(*b*) Hern's Pleader, 307.

(*c*) Fitz. N. B. 363.

guardian

SMITH *againſt* ANGEL.

guardian might aſſign dower *in pais*, ſo the dower in chancery is by the king himſelf, in a judicial and proper manner: but for chancery to decree that the wife ſhould have ſuch a third part, would not veſt a legal intereſt in her; the heir may do it in purſuance to a decree; and when he does, the wife is in by virtue of the aſſignment of the heir, and not by virtue of any decree. Then if the decree be not a title veſted, he has confeſſed *aſſets*, for he * [44] ſet forth only a reverſion depending upon * a freehold, and does not ſhew there was a freehold; and if the aſſignment of dower were good, *pro tanto*, yet here is two thirds whereof ſhe was not endowed, and that is only charged with an eſtate for years, and that is enough to charge him with a general judgment.

The caſe of *Davis v. Powys (a)* comes home very near to this caſe in every reſpect. In debt againſt an heir, if he plead any plea, that is not a ſufficient bar; if he ſuffer judgment to go againſt him by *nihil dicit*, or confeſſion, it ſhall be a *general judgment*; becauſe there is no way for the heir to defend himſelf, but by ſetting forth the truth, what aſſets he has, where they lie, and ſo open the truth of the caſe to the plaintiff; and let him take what benefit he can of it; and if he do not do this, there ought to be a *general judgment* againſt him, as well as upon demurrer. ' This authority was murmured at, but there is not a word of it but what is good law (*b*). Comb. 162. If the heir will confeſs that he has *aſſets by deſcent*, in ſuch and ſuch places, beſides which he has no more, and the iſſue is that he has more, though he confeſs enough, yet if more *aſſets* be found, there ſhall be a general judgment (*c*).

In this caſe, it is not in the power of the Court to give a ſpecial judgment, if the plaintiff do not deſire it, for it would be erroneous (*d*). If it be by conſent of the plaintiff, they may give a ſpecial judgment: But how can we do ſo here? If it be upon the confeſſion, we muſt allow the plea good; that is, that it is a reverſion expectant upon an eſtate for life, when it appears that it is not ſo. If he had pleaded that he had only a reverſion expectant upon an eſtate for life, and the plaintiff had replied that the tenant was dead or had ſurrendered, and it is ſo found by verdict, ſurely there muſt be a general judgment, becauſe he has pleaded a falſe plea in bar of the plaintiff's execution; and it appearing to us, that there never was ſuch an eſtate for life in being, it is of the ſame effect as if a verdict had ſo found it.

Let the plaintiff have a general judgment.

(*a*) Plowden, 420.
(*b*) See S. C. Moor, 520. Cro. Eliz. 639.
(*c*) 2. Leon. 11.
(*d*) 2. Roll. Abr. 71.

Caſe 60.

Anonymous.

A diſtringas is the proceſs of the hundred-court. S. C. ante. 1.

BY HOLT, *Chief Juſtice.* A writ of *levari facias* is not the proper proceſs of a hundred-court, but it is *a diſtringas*; but *a levari* may be by cuſtom.

Anonymous.

Anonymous.

Caſe 61.

BY Holt, *Chief Juſtice.* Upon bringing the bail-piece to Mr. Clark, and giving him ſatisfaction that the principal rendered himſelf before, or upon the return of the ſecond *ſcire facias*, he will give you a diſcharge or *ſuperſedeas* of the *ſcire facias.*

Poſt. 77.
Ld. Raym. 156. 342. 353.

* [45]

* The Queen *againſt* Ogden.

Caſe 62.

AN order was affirmed at the quarter ſeſſions of the peace for the county of *Dorſet.*

Proceedings upon a writ of *ad quod damnum* to incloſe an ancient highway.

It was an order of two juſtices of the peace of the ſaid county, founded upon a clauſe in the act of parliament, in the 8. *Will.* 3. c. 15. for enlarging the common highways (*a*). There was an *ad quod damnum* ſued out, and an *ad nullius damnum* returned; and an order thereupon made for incloſing ſuch an ancient highway, and ſetting out a place for another in ſuch a place; and an appeal from this order to the sessions, and there the incloſure was declared to be a great nuſance to the whole country.

Cro. Car. 266.
Vaugh. 341.]
Yelv. 141.
Ld. Ray. 725. 858. 1169. 1170.
Stra. 944. 1004. 1209.
2. Hawk. P. C. 153.
1. Com. Dig. 400.

Several exceptions were taken to the order of the juſtices at the quarter ſeſſions.

First, That it did not appear to have been at the next quarter ſeſſions after the order made (*b*).

Secondly, An exception was taken to the whole purport of the order; that it did not appear by it, what the way to be incloſed was, or what the new way, without which there was no certainty what the ſubject matter of the appeal was; for this being a method that the ſtatute has ordained for the determination, and making a final end of the matter, ſurely the thing whereof a final end is made, ought to appear very certain.

It is fit to conſider the very ſtatute, what alterations are made by it, and what not.

First, It is to be known that this clauſe does not alter at all the nature of the writ of *ad quod damnum*; but that writ is the ſame as it was before, and to be proceeded on as if this ſtatute had not been made; there are not any words in the ſtatute that do alter the nature of the writ, nor the method of proceeding thereupon, though there be ſomething added.

Secondly, This writ, after it is executed, is to be returned into the court of chancery; and in that caſe the ſheriff having taken an inquiſition, makes a return thereof *indilatè*; ſo are the words of the writ; ſo that now the writ is returnable * into chancery; and for this reaſon it is, that if the queen ſee thereby that there is no harm to incloſe, ſhe may grant leave to do it; and in

* [46]

(*a*) See now the 13. *Geo.* 3. c. 78. ſ. 19.

(*b*) See Ex parte Venner, 3. Atk. 172. 2. Hawk. P. C. ch. 76. ſ. 70.

The Queen against Osborn. order to that the inquiſition muſt find that it is *ad damnum nullius*; and there can be no foundation of incloſing without ſuch a return.

Thirdly, Without licence or grant to incloſe the old way; though the inquiſition find that ſuch incloſure would redound to the damage of none, and it be ſo returned, yet none could lawfully incloſe, or if he did he would be guilty of a nuſance (*a*). For it is not the inquiſition and return that gave any authority to incloſe, but the licence of THE CROWN grounded thereupon; and when there was ſuch an inquiſition, return, and licence, without any traverſe of the inquiſition, upon incloſure made, there was an alteration made of the way; and the old way ceaſed to be a way, and the new one ſet out became the common highway.

It would be a ſtrange conſtruction upon that clauſe of the ſtatute, that a man ſhould have a right to incloſe without a licence, to make ſo great an alteration, as to make the finding of an inquiſition tantamount to a royal licence; for though the inquiſition do not find it to the damage of any perſon, yet it is in the election of the king or queen to let the old one ſtand or not. And there is nothing in this act to induce us to make ſo great a leap as that is.

Suppoſe an inquiſition be taken, and returned into chancery, that would be a foundation for a licence; for the words of a writ are, what harm would it be to us, or to any of our ſubjects, that ſuch a way, deſcribing it in certainty, ſhould be incloſed; and a new one, deſcribing in the ſame manner, ſet out: but you will ſay that the *ad quod damnum* is now under the conuſance of the juſtice of peace, and an appeal thereupon given to the ſeſſions; how can it then go into chancery? Very well, if the ſheriff, after inquiſition taken, does get it enrolled as the ſtatute requires, returns it into *chancery*, as he is bound to do by the command of the writ: and all that the ſtatute requires is, that the inquiſition be enrolled at the next quarter ſeſſions; and if it be, and no appeal from it, or if there be an appeal, and a judgment thereupon for the inquiſition, the traverſe is thereby taken away: and it is a good plea to a traverſe, that the inquiſition was enrolled, and no *appeal; or that an appeal was brought, and the judgment for the inquiſition. *[47]

It may be aſked, when the appeal is to be brought? The words of the ſtatute are expreſs, that it be at the next ſeſſions after the inquiſition found. But they ſay farther, it is to be by the perſon grieved by the incloſure; ſo that you muſt take both the words together; that is, it muſt be at the next ſeſſions after the inquiſition taken, and the incloſure, for it cannot be ſooner; for till incloſure there is no grievance, and it muſt be ſomebody aggrieved by the incloſure. Here is indeed an incloſure; but it is not an incloſure by virtue of the inquiſition, according to the *ad quod damnum*, for it is without licence, and not by the authority

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(*a*) See 2. Hawk. P. C. ch. 76. ſ. 3.

of the act of parliament; and therefore not ſuch as does oblige the party to appeal.

The Queen *againſt* Ogden.

Per totam Curiam therefore the inquiſition was quaſhed.

Anonymous.

Caſe 63.

BY the Court and all the Clerks. It is irregular to ſign a judgment, without ſerving a rule to bring in a record. And a judgment was ſet aſide for want of it.

Judgment cannot be ſigned without a rule to bring in the record.—Tidd's Pract. 692.

Anonymous.

Caſe 64.

BY the Court. No man, though by conſent of parties, can be attorney on both ſides.

Anonymous.

Caſe 65.

THE COURT many times will fix the tranſitory action, where the defendant has not had probability of an indifferent trial.

Tranſitory action.

Comb. 47. 483. Ld. Ray. 331. 1253. 1418. 1. Vern. 267. 439. 1. Mod. Caſ. L. & E. 228. 316. Stra. 211. 858. 878. 1258. 1216.

The Queen *againſt* Clerk.

Caſe 66.

PER CURIAM. An information tried at the bar is not within the late ſtatute, 5. & 6. *Will. & Mary*, c. 18. of giving coſts againſt the proſecutor; for that ſays, the party ſhall enter into a recognizance of twenty pounds, and that the party ſhall have a *ſcire facias* thereupon; but twenty pounds would be too ſmall coſts in the caſe of a trial at bar.

An information tried at bar is not within 4. & 5. *Will. & Mary*, c. 18.

2. Ld. Ray. 1036. 3. Burr. 1616.

Anonymous.

Caſe 67.

BY Holt, *Chief Juſtice*. If a Judge who tried a cauſe be afterwards put out, upon a motion made for a new trial, he may certify to the Court what his opinion was when he tried the cauſe.

A Judge removed may report the evidence on a new trial.—Ld. Ray. 1513.

MICHAELMAS

MICHAELMAS TERM,

The Firſt of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

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*[48]
Caſe 68.

* Elvis *againſt* Mercato.

An attachment lies againſt an attorney who neglects to pay money into court purſuant to conſent.

S. C. 1. Salk. 314.
S. C. Ld. Ray. 865.
6. Mod. 42. 86.
1. Salk. 87.
1. Com. Dig. "Attorney" (B. 15.).
1. Term Rep. 422.
Tidd's Prac 124. 256.

IN A MOTION to put off a trial, the attorney made an offer *die Lunæ* to bring money into court; and a rule was thereupon made, that the other ſide ſhould ſhew cauſe why the trial ſhould not be put off on thoſe terms.

At which day the other ſide conſented.

So the rule was drawn *ex conſenſu*, and the trial put off.

And now the money not having been brought into court, an *attachment* was granted againſt the attorney.

MOUNTAGUE objected, that though the attorney had made ſuch a propoſal, yet he had not conſented the ſecond day.

But PER CURIAM, He ſhall not aver againſt the rule, which ſays it was by conſent; and we will not have our attornies trifle with us, and make a propoſal to-day and fly from it to-morrow.

Caſe 69. Read *againſt* Tregeagle.

A bond and judgment given for a juſt debt ſhall not be ſet aſide, though entered up and executed contrary to the agreement of the parties. Poſt. 118.

6 Mod. 184.

READ gave a bond and judgment to *Tregeagle*, defeaſanced upon payment of money on ſuch a day certain; and it was agreed by the ſame deed between the parties, that *Tregeagle* ſhould not ſue any execution againſt *Read* before the ſixteenth of *July*. On the fifteenth of *June*, *Tregeagle* ſued out a *fieri facias*, delivered it to the ſheriff before the ſixteenth of *July*, and got it executed on the ſixteenth of *July*, upon demand and non-payment.

* [49]

BRODERICK moved to ſet it aſide; for that the plaintiff, by breaking his agreement, had *incapacitated the defendant to perform; for by the delivery of the writ to the ſheriff, the property of them was bound, ſo that he could not ſell any of them to raiſe the money.

But PER CURIAM, Since it is for a juſt debt, and judgment executed, we will not now undo anything; for, perhaps, that would be a means to fruſtrate the judgment: and beſides, you have no oath that any purchaſer was deterred by reaſon of taking out and delivering the writ; and here *Read* had a good remedy by action of covenant.

Stra. 823. 1242.

HOLT, *Chief Juſtice*, remembered the like caſe, where covenant was brought, and damages thereupon recovered.

And THEY ALL SAID the rule was, that where a miſchief was on either ſide, and a remedy on the one, and none on the other, they would ſuffer that to continue againſt which there was a remedy.

HOLT, *Chief Juſtice*, ſaid, that an *audita querela* would not lie in this caſe, becauſe that would pull up all by the roots, and avoid the whole judgment.

Caſe 70. Anonymous.

A *ſcire facias* againſt a plaintiff in error is only to compel an aſſignment of errors.

AFTER A WRIT OF ERROR ſued out, if a *ſcire facias* be brought againſt the plaintiff in error, to ſhew cauſe why there ſhould not be execution on the judgment, the end of it is, to compel the plaintiff to aſſign errors; and execution ought not, in ſtrictneſs, to be taken out, until *non proſ.* entered.

Ld. Ray. 405. 1295. Fitzg. 175. Comy. 117. 321. and the caſe of Cox *v.* Moſeley, Carth, 40.

Caſe 71. Anonymous.

The *niſi prius* record may be amended by the paper-book. Poſt. 156.

Ld. Ray. 134. 421. 1101.

ASSUMPSIT BY AN ADMINISTRATOR, for goods ſold and delivered by his inteſtate, and a promiſe likewiſe to him. The defendant pleaded "*non aſſumpſit infra ſex annos* to the plain-"tiff." The plaintiff replied a promiſe to the inteſtate within ſix years, and iſſue thereupon, and verdict for plaintiff.

And

Anonymous.

And this being moved in arreſt of judgment, and appearing thus upon the record of *niſi prius*,

Per Curiam. If the *paper-book* or copy of the iſſue was right, we would amend it; and made a queſtion, Whether it be not within the ſtatute of *Oxford*?

Anonymous.

Caſe 72.

Evidence.

1. Vern. 53. Stra. 416. 1094.

HOLT, *Chief Juſtice.* Confeſſion is the worſt ſort of evidence, that is, if there be no proof of a tranſaction or dealing, or, at leaſt, a probability of dealing between them; as here there was, the one being a ſailor, and the other a captain of a ſhip.

*[50]

* Withers *againſt* Harris.

Caſe 73.

In ejectment, if no execution be ſued within a year, the judgment muſt be revived by *ſcire facias* before execution ſhall iſſue.

S. C. poſt. 64.
S. C. Salk. 258. 600.
S. C. 3. Salk. 319.
S. C. Holt, 77. 265.
S. C. 2. Ld. Ray. 806.

HOLT, *Chief Juſtice.* If one will take out execution within a year after judgment, he may continue it down after the year by *vicecomes non miſit breve*, without being put to a *ſcire facias.* And he ſaid, he had known it adjudged on debate, that there was no need of a *ſcire facias* to have execution in ejectment after the year and a day; but he ſaid, he never could agree with that opinion, nor ſee any reaſon for it; for in all real actions, as upon fine *ſur conceſſit*, there muſt be a *ſcire facias* after the year.

And **all the Court** were of the ſame opinion.

But it was referred to **the master** to examine, Whether it was after the year or not, or whether there had been a *vicecomes non miſit breve* of any execution taken out within the year?

And it appearing on examination to be after a year and a day, no proceſs taken out within the year, **it was held**, that it could not be the proceſs in ejectment; for execution is an *habere facias poſſeſſionem* for the Term, and a *fieri facias* for damages.

Anonymous.

Caſe 74.

Attorney cannot be changed without leave.

BY **the Court.** You cannot change your attorney without leave of Court, to be obtained on motion, though he be ever ſo great a cheat.

1. Peer. Wms. 460. 3. Peer. Wms. 104. 277. Stra. 76. 402. 414. 547. 621. 633. 693. 1. Bl. Rep. 8. Dougl. 206.

Wood *againſt* Sutton, Marſhal of the Court.

Caſe 75.

Bail.

6. Mod. 57.
Stra. 413. 781. 526. 872. 877.

JUDGMENT was given againſt him in debt for an eſcape; and he brought a writ of error, and put in ſham bail, and ſo on, *toties quoties*, they were excepted againſt.

Upon affidavit of this, a rule was made peremptorily for his putting in good bail on ſuch a day, or elſe execution to go.

Caſe 76. Anonymous.

If a defendant's attorney do not pay the iſſue-money in twenty-four hours after iſſue delivered, judgment may be ſigned.

2. Salk. 515.
Comy. 533.
Stra. 735. 1177.
Sayer, 19.
Tidd, 466.

BY THE COURT and THE CLERKS. When there is a ſpecial iſſue tendered, and the other ſide joins in it, the book is ſent back to the defendant's attorney, and he has *four days* given him, either to join in the iſſue, or to waive it and give the general one; and after the four days, he ought to ſend the paper back without any demand of the attorney of the other ſide; and if he fail in it, the other may ſign judgment for want of joining in iſſue: but if the attorney will take back the book after the four days, and receives money for entering the * iſſue or making up the record, he ſhall not afterwards enter his judgment.

* [51]

Caſe 77. Anonymous.

If a plea in abatement be over-ruled, and a *reſpondeas ouſter* awarded, a copy of the plea in chief only need be delivered and paid for.

1. Salk. 5.
1. Ld. Ray. 329.
Carth. 447.
5. Mod. 399.
12. Mod. 119.
Tidd's Practice, 463.

A PLEA IN ABATEMENT was over-ruled, and a *reſpondeas ouſter* awarded, and the *general iſſue* pleaded.

It was a queſtion, Whether the defendant's attorney ſhould deliver a copy of the iſſue, declaration, and the record of the plea in abatement, to the plaintiff's attorney, and pay for it? And the printed rule of the Court was read.

THE COURT would conſider of it, though the conſtant practice was agreed to be, that the defendant's attorney ſhould do it.

And IT WAS MADE A RULE, that it ſuffice for the future, after plea in abatement over-ruled and general iſſue pleaded, for the defendant's attorney to deliver a copy of the declaration and iſſue, without any copy of the plea in abatement.

NOTE, It is a conſtant practice for a plaintiff to ſign judgment by default, for want of a copy of the iſſue and paying for it, and ſo execute a writ of enquiry (*a*).

(*a*) See Combe *v*. Pitt, 3. Burr. 1682. where a plea in abatement and judgment of *reſpondeas ouſter* were omitted in the plea roll, and the Court held the omiſſion to be immaterial, particularly as the defendant had accepted and paid for the iſſue. Tidd's Practice, 464.

Caſe 78. ——— *againſt* Tempeſt.

Non eſt factum ſpecially pleaded.

6. Mod. 217.
1. Salk. 274.
Ld. Ray. 787. 803.
Comy. 303.

DEBT UPON A BOND. A ſpecial *non eſt factum* was pleaded, with a concluſion of *et hoc paratus eſt verificare.* The plea alſo referred to a condition in the bond without any *oyer* had of it; and there was a demurrer for both cauſes.

As to THE FIRST it was ſaid, that it was either way, *viz.* to aver or to conclude to *the country*. And *Keb.* 3. *fol.* 132. *Hil.* 25. *Car.* 2. was quoted; and the caſe of *Day v. Roberts*, in this court, in the year 1693.

To which opinion HOLT, *Chief Juſtice*, inclined: as if in bar to a debt upon a bond one ſhould ſay, that he delivered it as *an eſcrow*, to be delivered over as his deed upon ſuch a thing to be done; which being not done, the plaintiff got the deed, *et ſic non eſt factum, et hoc paratus eſt verificare*, and leave the plaintiff to tender iſſue in the replication.

As to THE OTHER, it ſeemed a fatal exception.

Plaintiff had judgment.

Anonymous. Caſe 79.

Bail render the principal.
Poſt. 77. 85. 98.
Ld. Ray. 156. 721. 1452. 1467.
Comy. 554.
Stra. 443. 526. 1270.

SCIRE FACIAS againſt bail who had rendered their principal before a Judge, but he immediately eſcaped.

And they moved to file the bail-piece, in order to plead a render of principal.

PER CURIAM. We cannot deny leave to file the bail-piece, for without it they may plead *nul tiel record* to the *ſcire facias*; for one cannot proceed upon the *ſcire facias* without bail-piece be filed.

* Anonymous. Caſe 80.

The Court may execute a judgment without a writ.
3. Salk. 46.

BY HOLT, *Chief Juſtice*. If we ſee one againſt whom there is a judgment of this court walk in *Weſtminſter-Hall*, we may ſend our officer to take him up, if the plaintiff deſire it, without a writ of execution.

Anonymous. Caſe 81.

Falſe impriſonment lies againſt a bailiff for arreſting a man after the return of the writ.
1. Mod. 56.
6. Mod. 96.
1. Sid. 229.
Moor, 711.
3. Cro. 180. 408.
1. Salk. 8.
Ld. Ray. 353.
Stra. 509. 1184

HOLT, *Chief Juſtice*. If one be arreſted after the return of a writ, falſe impriſonment lies againſt him who ſo arreſts him (*a*).

Here complaint was made to the Court, that one was arreſted in *Trinity Term*, by virtue of a writ returnable in *Eaſter Term*, and a bail-bond taken for appearance at the time of the return of the writ.

PER CURIAM. There is good matter to plead againſt an action upon the ſtatute of 23. *Hen.* 6. c. 10. And though the bond be antedated, yet it may well be done with a *primo deliberat.* at the true time.

The fact was referred to THE MASTER to examine, in order to puniſh the officer for oppreſſion.

(*a*) See Lidford *v.* Thomas, 6. Mod. Rep. 29. and Planck *v.* Anderſon, 96. Loveridge *v.* Plaiſtow, 2. H. Bl. 5. Term Rep. 37.

Caſe 82.

Fuller's Caſe.

The marſhal of the queen's bench may fetter a priſoner in execution for a fine.

Poſt. 114.

Ld. Ray. 136.

FULLER being committed to the queen's bench for a fine to the queen, and charged in execution at the ſuit of ſeveral others, THE MARSHAL had a jealouſy of him, and put irons upon him.

Upon which he wrote a letter to THE ATTORNEY-GENERAL, craving his help.

THE COURT, on this being communicated to them, ordered the marſhal to keep him according to law, declaring, that if he died through cruel uſage, it would be murder in the gaoler; but owning alſo, that he might juſtify putting him in irons if he feared an eſcape, or if he were otherwiſe unruly.

Caſe 83.

The Queen *againſt* Buckbridge.

An indictment for being "*a* "*common drunk*-"*ard*" is too general.

Salk. 382.
6. Mod 256.

AN INDICTMENT was found againſt *Buckbridge*, for that he was *a common drunkard*, and a common *profane ſwearer* and *diſturber of the peace*, and a conſtant *frequenter of tippling-houſes*.

And the indictment was quaſhed, for that the charge was too general and looſe.

311. Ld. Ray. 1013, 1094. 1197. 1363. 3. Peer. Wms. 493. 499. Fitzg. 56. 122. 263. Stra. 2. 8. 497. 699. 866. 995. 1246. And ſee 4. Hawk. P. C. 7. edit. ch. 25. ſ. 59. and ſ. 74.

* [53]

Caſe 84.

* Anonymous.

A warrant of attorney given by a *feme ſole* is not revoked by her marriage.

S. C. 12. Mod. 383.
S. C. 1. Salk. 117.
2. Saund. 213.
Comb. 242.
Ld. Ray. 1050.
Stra. 811.
Tidd's Pract. 300.

A FEME-SOLE having a warrant of attorney to enter judgment to her, married before it was entered.

KING moved, that it might be entered, and that the judgment ſhould be to the huſband and wife; and he took a difference between ſuch a warrant made by a *feme-ſole*, and one made to her; for a marriage in the firſt place would be a countermand of the warrant, as being to the diſadvantage of the huſband. And for this he quoted a caſe in point, in *Eaſter Term*, in the ninth year of *William the Third* (a), where leave was denied to enter a judgment againſt huſband and wife, upon a warrant by the wife before marriage; and compared it to the caſe of a grant of a reverſion by *a feme-ſole* who marries another before *attornment*, the grant is countermanded: but if ſhe had granted it to *A.* and before *attornment* had married him, an *attornment* after were good (b).

THE COURT inclined to this opinion.

But upon the reading of the warrant, it appeared to be to enter judgment as of ſuch a Term, which was now paſt (c).

(a) 1. Salk. 399.

(b) Co. Lit. 310. 4. Co. 61. a.

(c) See 1. Mod. 1. and Tidd's Pract. 302.

Watts *againſt* Roſewell.

Caſe 85.

Concluſion of the plea of *non eſt factum.*

S. C. 2. Ld. Ray. 803.
S. C. 1. Salk. 274.

Poſt. 105.
Comb. 86. 311. 479.
1. Saund. 283.
2. Saund. 190.
1. Salk. 2.
Ld. Ray. 337. 817.

THE CASE being again moved (*a*), the caſe of *Ward v. Forth* (*b*) was quoted as an authority in point, that the concluſion was bad; for that by the general concluſion he had waived the ſpecial matter of the plea: for it is a rule in pleading, that when a man pleads ſpecial matter, and concludes generally, he thereby waives the ſpecial matter.

And it was agreed on both ſides, that here he might have pleaded general.

On the other ſide, the caſe of *Manning v. Bucknal* (*c*) was quoted, which was this: Debt upon an obligation; the defendant pleads, it was delivered as an eſcrow, and ſo *non eſt factum*, *et hoc eſt paratus verificare*; to which the plaintiff demurred generally, becauſe it tended to the general iſſue: and the Court ſaid, that this is a plea which may conclude either way, and is moſt uſual with this concluſion; though generally, when the negative plea doth waive all precedent, he ſhall conclude to the country; as on *non aſſumpſit infra ſex annos.*

But there being no judgment in the caſe of *Manning v. Bucknal* (*d*), the plaintiff had judgment *niſi*; *abſente* HOLT, *Chief Juſtice.*

(*a*) The former motion in this caſe is not reported in this volume.—It was an action of debt on bond; to which the defendant pleaded, that it was delivered as *an eſcrow* to be his *deed*, upon the plaintiff's ſealing and delivering a general releaſe; and that the ſaid releaſe was never ſigned and delivered, and ſo it was *not his deed*; concluding with a *verification*. The plaintiff demurred, and ſhewed for cauſe, that the plea ought to have concluded to *the country*. S. C. 1. Salk. 273, 274. See —— *v.* Tempeſt, ante, 51.

(*b*) 1. Vent. 210. S. C. 3. Keb. 26.

(*c*) 3. Keb. 142.

(*d*) The judgment, as reported by *Keble*, was for the defendant *niſi*, 3. Keb. 142. but no judgment whatever is entered on the roll, 1. Salk. 274. It is ſaid, however, that the Court changed the opinion they had given on the firſt motion, and that judgment was ultimately given for the plaintiff, 2. Ld. Ray. 803.

Anonymous.

Caſe 86.

Ld. Ray. 62. 148.
Stra 691. 1105. 1142.
Poſt. 64. 117.

PER CURIAM, If a Judge at a trial erroneouſly over-rule a matter offered in evidence, the regular way is to tender *a bill of exception*; yet if, upon ſuch a matter, the party will ſuffer the trial to go againſt him, it is good cauſe of a *new trial.*

*[54]

* Hyon *againſt* Ballard.

Caſe 87.

Ld. Ray. 679.

PROCEEDINGS ON BAIL-BOND, for want of bail above. Upon a motion to ſtay proceedings, the defendant produced a releaſe under the ſeal of the plaintiff; and thereupon the plaintiff's

Hyon *againſt* **Ballard.**

attorney, ſuſpecting it, conſented to deliver a declaration forthwith, and that the defendant ſhould plead the releaſe, and ſo try it; which being done, the plaintiff was nonſuited at the trial; but afterwards, it being diſcovered to be a notorious forgery, a motion was made for a new trial.

But THE COURT ſaid, they could make no rule in the caſe, the plaintiff being out of court upon the nonſuit.

But ſince the rule to ſtay proceedings upon the bail-bond was not abſolute, but till the Court ſhould farther direct, that, ſaid THE COURT, was ſtill before them; and therefore let the rule be, that they ſhew cauſe why proceeding ſhould not go on. QUOD NOTA.

Caſe 88. The Queen *againſt* The Pariſh of Caple, in Surrey.

Order for removal quaſhed.

S. C. Sett. & Rem. 207. Ld. Ray. 41. 395. 513. 567. 1332. 1454. 1473. Comy. 86. 97. Stra. 393. 544. 437. 698.

AN ORDER OF TWO JUSTICES was made to remove a man and his two children out of the pariſh of *Caple*, where he might become chargeable, he having not rented a tenement of ten pounds a-year.

AND IT WAS HELD, that ſaying they "might become chargeable" was not well; but it ſhould be, that they were "likely to become chargeable."

But IT WAS HELD, that ſaying they had not rented a tenement of ten pounds a-year did ſuffice.

The order was held bad as to the children, for they are only removeable as perſons not ſettled and likely to become chargeable, or ſo young as they are not able to provide for themſelves.

And it was quaſhed as to the children.

* [55]

Caſe 89. The Queen *againſt* Sir John Bucknell.

AN INDICTMENT was brought againſt *Sir John Bucknell* for not repairing a certain bridge, &c. which he was bound to repair *eò quòd* he was lord of the manor of *De La More*. And it being moved hither after conviction,

BRODERICK moved, that there were but three ways that a man could be liable to ſuch a charge: firſt, by his *deed*; ſecondly, by *preſcription*; or, thirdly, *ratione tenuræ*; * that this here could be none of them; and therefore the indictment was bad (*a*). *Stiles*, 400. *Latch*, 106. *Noy*, 93.

An indictment for not repairing a bridge, alledging that the defendant ought to repair it, because "*he now is, and* "*for divers years* "*laſt paſt was*, "*lord of the manor*, &c." is inſufficient, for he is not liable as *lord of the manor*; and therefore it ought to have ſhewn, that he was liable *ratione tenuræ*, or by *preſcription*. S. C. poſt. 93.—S. C. 1. Salk. 358. S. C. 6. Mod. 150. S. C. Holt, 128. S. C. 2. Ld. Ray. 792. 804. Poſt. 98. Stra. 180. 900. 2. Ld. Ray. 856. 1175. 1249.

(*a*) See Sir Henry Spiller's Caſe, Stiles, 108. Anonymous, Stiles, 400. Anonymous, Latch, 206. S. C. Noy, 93.—See alſo the Year-Book, Mich. Term, 5. *Hen.* 7. page 3. pl. 8.

Holt, *Chief Juſtice*. A man is not bound to repair a bridge becauſe he has a manor, or is lord of a manor. But it muſt be ſaid, that this is ſome charge upon the manor that can oblige the man to repair, and that only can be one of theſe two ways:—**First**, That he held the manor by the ſervice of repairing the bridge, &c. that is, *ratione tenuræ*; and this being a charge upon the poſſeſſion, is like any other ſervice for which the tenant in poſſeſſion is chargeable. Every tenant in poſſeſſion, be he but tenant for years or at will, is bound to repair; and immediately upon default of repair, he is indictable. The other way of charge is by *preſcription*, and then it muſt be the *terretenant*, and all thoſe whoſe eſtate he has did uſe and were bound to repair; and here you neither ſhew *tenure* or *preſcription*. But as to charge of repairing a bridge, it will be well to ſay, that *omnes occupatores*, *&c.* But where one goes to charge the eſtate of another with anything for his own benefit, he muſt either ſay, that he and all thoſe whoſe eſtate, &c. or at leaſt *omnes terr. tenentes* (*a*).

The Queen *againſt* **Sir John Bucknell.**
6. Mod. 150. 255. 307. Poſt. 98. 1. Salk. 358.
Vide 6. Mod. 4.

And here, **per Curiam**, the judgment was ſtayed.

(*a*) See the caſe of Rider *v.* Smith, 3. Term Rep. 766.

The Queen *againſt* Harris. Caſe 90.

An order to diſcharge an apprentice muſt be ſigned.

A**N ORDER OF JUSTICES** for diſcharging an apprentice upon the ſtatute of 5. *Eliz.* c. 4. was quaſhed, it being not ſigned by them, as that ſtatute requires.

Ld. Ray. 1198. 1410. Stra. 48. 69. 143. 704. 1013. 1110.

Seals.

And **Chesshyre** ſaid, that one piece of wax could be the ſeveral ſeal of ſeveral people, putting their ſeals ſeverally to it.

Denning *againſt* Cloſe. Caſe 91.

Inferior court. Ld. Ray. 231. 309. 1100. 1530.

A **PLAINT** was levied in an inferior court before the debt contracted, and an arreſt upon a proceſs upon the plaint.

And **per Curiam** adjudged ill.

Anonymous. Caſe 92.

Writ of enquiry.

A **WRIT OF ENQUIRY** is ſet aſide daily for exceſſive damages.

2. Leon. 214. 3. Leon. 117. Ld. Ray. 1411. 1. Mod. Caſ. L. & E. 349. Stra. 425. 515. 1259. 3. Burr. 1846. Tidd's Pract. 324.

* [56]

* Lucy *againſt* The Biſhop of St. David's. Caſe 93.

Excom. cap. Return. S. C. poſt. 117.

H**E** was taken up by an *excommunicato capiendo*, and in the gaol of **Newgate**; and the writ being not yet returnable, he removed himſelf up by *habeas corpus*.

S. C. 1. Salk. 106. 294. S. C. 2. Ld. Ray. 817. Ld. Ray. 619. 701. 1. Peer. Wms. 435. 3. Peer. Wms. 55. Stra. 43. 76. 265. 413. 946. 1067. 1189.

Lucy *againſt* The Biſhop of St. David's.

And per Curiam, He has no day in court, until the writ of *excommunicato capiendo* be actually returned; for the command of the writ was, to take and keep him; and to return the writ, how he had executed it; but upon ſuch return likewiſe the party has no day in court, but muſt bring himſelf in by *habeas corpus.* And before he can plead to the writ, it muſt be returned here on record, for the writ is to be adjudged good, or quaſhed, as it is good or bad upon their plea; and the enrolling of the writ on the record, at its iſſuing out, is not enough to give day in court, or to appear to and plead.

And the Counſel of the other ſide inſiſted on it, and obtained leave to examine the *habeas corpus*, which recited the writ of *excommunicato capiendo* with the writ.

And here it was complained of, that a double writ of *excommunicato capiendo* was taken out with a double return, to the end if he were taken by one and diſcharged, he might be taken up again by the other, and ſo vexed.

The Court very much diſapproved of this practice; though it was agreed, there might be two, if there were two excommunications for the ſame cauſe,

So he was remanded.

But being brought up again at the day on which the writ was returnable, and the writ being then returned;

He offered a plea in parchment, which, reciting the ſeveral writs of *excommunicato capiendo*, by which he had been taken up and detained, one upon a *ſignificavit* of excommunication for not paying coſts, upon a ſentence againſt him before the archbiſhop upon his ordinary juriſdiction, and the other upon a *ſignificavit* upon a ſentence on an appeal of the former ſentence before the delegates;

Poſt 57. 117. 6. Co. 52. 1. Vent. 298. Tidd, 44.

His plea was, that he was made *Biſhop of St. David's*, and called to parliament by writ at ſuch a time; after that he ſat in parliament as a peer; and ſo concluded *in abatement*, becauſe a *capias* did not lie againſt a peer.

Note, He farther ſet forth in his plea, that he was brought up to this court by *habeas corpus*, and turned over to the cuſtody of the marshal, and then pleaded,

But the truth being otherwiſe, the Court made him ſtrike that part out of his plea; for the filing of an *habeas corpus* here did not make * [57] him a priſoner to *the marſhal*; for the Court, notwithſtanding, may remand him to *Newgate.*

Another matter in their plea was, it begun with a *petit judicium de brevi præd.* concluding with *unde petit judicium, &c.*

But THE COURT held that well, the plea having begun right.

NOTE, The queſtion intended was, If a peer ſhould be excommunicated, and continue ſo forty days, what remedy ſhall there be againſt him?

Queſtion.

Ld. Ray. 1113, 1442.

3. Peer. Wms. 455.

Stra. 734. 985, 1065.

And it was ſaid, there was none but that of being expelled the pale of the church, and the communion of the faithful.

But POWELL, *Juſtice*, ſaid, he knew no law but a *cap. excom.* lay againſt a biſhop or other lord.

But HOLT, *Chief Juſtice*, The queſtion is not before us, and therefore let us not meddle with it: and he ſaid, he did not believe they were in earneſt with their plea.

But it was excepted to the *ſignificavit* as recited in their plea, and ſo was the writ of *excommunicato capiendo* too, that he was condemned in coſts, *in quodam negotio officii ſive correctionis.*

Significavit. Exceptions.

This was ſaid to be ill for uncertainty; for it was ſaid, the writ of *excommunicato capiendo* ought to recite the *ſignificavit* right, that the Court might know what proceſs to award upon the ſtatute of 5. *Eliz.* c. 23. which, in all caſes of excommunication, orders the writ to be ſent into this court, and entered on THE ROLL here, and then delivered to the ſheriff; and in caſe he be not taken thereupon, to iſſue another *capias*; and this in all caſes except the nine mentioned in the ſtatute; but if it be for any of the nine mentioned in the ſtatute, then upon a *non eſt inventus* returned to iſſue a new proceſs, with proclamation and penalty. So that the Court cannot here tell what proceſs to iſſue, without the cauſe be certainly mentioned in the *ſignificavit* recited in the *excommunicato capiendo*, that is, whether it be one of the nine cauſes or not. And they cannot judge on the original *ſignificavit*, for that is not here, but in chancery; and chancery cannot relieve them thereupon, becauſe they are not to make the proceſs upon it; but this court is. But before the ſaid ſtatute, if the *ſignificavit* had not certainly mentioned the cauſe, it was ſufficient.

And HOLT, *Chief Juſtice*, put the caſe of *Fowler*, a quaker, in this court: ſome years before he was excommunicated *pro ſubſtractione decimarum ſive alior. jurium eccleſiaſticor.* which likewiſe was judged uncertain; and there, upon conſideration, * it was reſolved, that before that ſtatute of the fifth of the queen the cauſe need not be mentioned in the writ of *excommunicato capiendo*; for there, if the *ſignificavit* was not good, they applied to chancery, where the writ is returnable, and there it was quaſhed. But the ſtatute of 5. *Eliz.* c. 23. has made great alterations; which ſtatute orders, that the writ be brought into this court, and enrolled here before it was delivered to the ſheriff; ſo the power that was in chancery before the ſtatute is now taken from it, and given to this court; for if the writ be returned *non eſt inventus*, the *alias capias* ſhall go out of this court. If it be one of the nine cauſes, ſays the ſtatute,

1. Salk. 253.

* [58]

LUCY *againſt* THE BISHOP OF ST. DAVID'S.

ſtatute, there, upon return of *non eſt inventus*, there muſt be proceſs, with proclamation and penalty; ſo there muſt be an *alias capias*, if it be not one of the nine cauſes; and if it be, there muſt be an *alias proceſs*, with farther proclamation and penalty: and this muſt now be the right way by neceſſary conſequence of law; for if the *ſignificavit* be in chancery, and bad, there can be no remedy there, for the writ is here, and the proceſs is to be made here; and they cannot ſuperſede a writ returnable here, eſpecially after the Court here is poſſeſſed of it. Then if the writ be there, how can we give remedy according to the ſtatute, if we do not know what the cauſe of excommunication is? And how can we know that otherwiſe but by the writ reciting the *ſignificavit*? for we cannot know by the writ in chancery, which we have not; and it ought to appear to us to be a cauſe of eccleſiaſtical cognizance, as it ought to be: and he quoted *Trollop's Caſe* (*a*). In the *caſe of Fowler* (*b*), the writ was quaſhed, and he diſcharged; but that cannot be done till the writ be returned, for it cannot be done on the entry made on THE ROLL at the iſſuing of it out. And the caſe of *King v. Hill* (*c*) was, *in quodam negotio concernen. eruditionem ſive inſtructionem liberorum*, and it was quaſhed for uncertainty.

And whereas in this caſe, POWELL, *Juſtice*, objected the caſe in *Cro. Car.* 196.; for there the writ only ſaid, for non-payment of coſts, and held well enough;

HOLT, *Chief Juſtice*, ſaid, that he had, upon the debate and conſideration of the former caſes, viewed many precedents; ſome immediately after the ſtatute was made, and all of them mentioning the cauſe in certainty: and beſides, the reaſon of the thing made it abſolutely neceſſary; for to what purpoſe ſhould the ſtatute enable us to iſſue proceſs, and to vary our proceſs according to the nature of the offence, * if we have no means to know the offence? And he ſaid, the writ in THE REGISTER was quite altered by the ſtatute, and the writ is only *pro contumaciâ*.

And he ſaid further, We are not to iſſue proceſs here as inſtruments or conduit-pipes, but judicially as Judges: and it will not be an objection to ſay, that we may award proceſs at all hazards, and let the party grieved come after and plead to it; for we ſhall never grant an ill writ, that the party may avoid it in pleading.

And as to the plea of peerage, he ſaid it was a fooliſh one; and the writ and his ſitting in parliament ſignified nothing; for he was a peer by being created biſhop, and the writ and his ſitting in the houſe added nothing to it.

And day being given to the queen's Counſel until *Thurſday* following to anſwer the pleas, and object;

(*a*) 8. Co. 68. Cro. Jac. 212. 2. Bulſt. 139.

(*b*) 1. Salk. 253.

(*c*) Trinity Term 12. *Will.* 3. 1. Salk. 294. 12. Mod. 517.

The Biſhop's Counſel moved to have him bailed, and quoted *Latch*, 174. 204. *Mo.* 406. *Cro. Car.* 501. where one was bailed after plea pleaded.

But THE COURT refuſed to bail him.

POWELL, *Juſtice*, ſaid, it would be of ill conſequence to bail him; or if they ſhould judge the writ good, then they would bail a man not bailable by law; and he was remanded to gaol.

THE BISHOP being brought up again, he inſiſted on his plea; not waiving, however, his exception to the writ.

BRODERICK moved, that he ought not to be admitted to plead, Vide infra. by which, perhaps, the matter might be finally determined in his favour, without a *ſcire facias* to *Mr. Lucy* the promoter, who had been at the charge of the proſecution, and by conſequence concerned in point of coſts, the excommunication being for non-payment of them.

TO WHICH *it was anſwered*, that though the writ nor the ſtatute of the queen did require the ſheriff to bring him into court upon the return of the writ, yet the writ was returnable; and he coming in upon a *habeas corpus*, and pleading to the writ at the day of the return of it, the Court could not deny his plea; and that he was not bound to bring a *ſcire facias*.

To which THE COURT inclined; but if he had come in after the return of the writ, and deſired to plead for his diſcharge, there, perhaps, a *ſcire facias* would be neceſſary.

AND NOTE, Here he had *oyer* of the writ returned before he put in his plea, which was judged neceſſary.

NOTE LIKEWISE, There were two other writs out, and the ſheriff returned upon the *habeas corpus*, that he had him in cuſtody upon both of them; but the two latter were not yet returnable, one of them being returnable the laſt day of the Term.

* [60] * And PER CURIAM, His plea could not go to them, they being not in court till they were returned; for the enrollment of them is only before they are delivered out, to inform the Court, Opinio Curiæ. that there are ſuch writs gone out; upon which, if there be a return of *non eſt inventus*, they may award a new proceſs, or if it be ill, when it comes back, to receive plea or exception to it, and ſo quaſh it, and ſet the party at liberty; but ſtill they are not the writs of this court, ſo as this Court can ſuperſede them: and the chancery neither cannot ſuperſede them, which was obſerved to be very inconvenient; for here would be a writ erroneouſly iſſued out, Note. and it ſhould be out of the power of any court of *England* to ſuperſede it.

THE PLEA being received, and going generally to the writ, Vide ſupra. it was again queſtioned, whether there ſhould not be a *ſcire facias* to the promoter?

And

Lucy *againſt* The Biſhop of St. David's.

And that there ſhould, was quoted the caſe of *Codrington v. Rodman (a).* And he compared it to the caſe of pleading a pardon, where there muſt be a *ſcire facias.*

Ld. Ray. 709. Holt, *Chief Juſtice*, ſaid, that in caſe of pardon by parliament, though it extend to all the king's ſubjects, yet the Court is not bound to take notice of it if it be not pleaded, if the very act does not expreſsly command them to do it.

The Court ſaid, that the conſideration of a promoter in this caſe, in regard to his coſts, would be different from a caſe where one ſues for tithes, or for defamation, or the like; for there the whole ſuit is the plaintiff's: but here the ſuit was the queen's, and *Lucy* only promoter.

Per Curiam. One may have a day given him upon a *habeas corpus* for the queen, becauſe ſhe is always preſent in court. And if a man outlawed be taken upon a *capias utlagatum*, and brought in cuſtody into court upon the return of it, that is a ſufficient day for the defendant to plead againſt the king: and yet there he cannot plead to have pardon allowed without a *ſcire facias* againſt the party to the original ſuit, which *ſcire facias* is to be taken out, and grounded upon the letters patents of pardon ſuggeſted; but the preſent caſe is not like that, for here the promoter is not ſuch a perſon as ought to have a day in court, before the plea on the *excom. capiendo* be determined.

And becauſe they inſiſted upon the plea here, the king's Counſel had time *ad reſpondend.* to their plea.

Note, It was not *ad replacitandum.*

*[61] And here * again they prayed he might be bailed; and for authorities were quoted, 1. *Cro.* 507. 552. 558. 1. *Bul.* 122. *Latch*, 174.

Holt, *Chief Juſtice.* It has been done, but it is matter diſcretionary in the Court whether they will do it or not; and why ſhall they do it upon ſuch a plea as this, which is mere fact?

And though Powell, *Juſtice*, ſaid, by the ſtatute of *Weſtminſter the Second* he ought not to be bailed;

Yet it was agreed, that act did not abſolutely bind the Court, but that they had a diſcretionary power; and it was done not long ago in the *caſe of Daviſon (b)*, who was excommunicated for teaching without licence.

Holt, *Chief Juſtice.* If a man be taken in execution, and he bring an *audita querela*, upon producing a deed of releaſe, and proof made thereof, we do bail him, though that be matter of fact: but here it is notoriouſly known, that *the Doctor* is deprived, and ſome of the Judges of this court have been of the Delegates when the ſentence was confirmed; and though, judicially, we cannot

(a) Cro. Car. 198. S. C. 1. Jones, 227.

(b) 1. Ld. Ray. 603. Salk. 105.

take notice of that ſentence, it not being judicially before us, yet we can take ſuch notice of it as to guide our diſcretion by it. Lucy *againſt* The Bishop of St. David's

And it was ſaid by the Court, that one had never been bailed in this caſe but upon ſuch exception taken as the Court plainly ſaw was not maintainable; but according to your plea, a biſhop cannot be excommunicated, ſo as to be anyway more puniſhable than in the primitive times, before the Church had any help of the lay power.

And he was committed again to Newgate, there being two other writs on which he was taken yet unreturned.

Mr. Attorney-General after this, and before the day of return of the other writs, came and informed the Court, that *the Doctor* had ſerved a rule on Sir Samuel Astry, *Clerk of the Crown*, to reply to his plea by ſuch a day.

And at the day, he took out a peremptory rule to plead, and ſerved it on Mr. Attorney. Rule to reply.

And becauſe the Court was acquainted by Mr. Attorney, that the queen was concerned in point of intereſt, there being an information of intruſion againſt him in the exchequer for the temporalities;

And the Court were of opinion, the firſt rule ought to be on the attorney-general; and for that there never is a peremptory rule in the firſt inſtance, the rule on Mr. Attorney was ſet aſide;

It was agreed, if this were a common crown * cauſe, as a riot, miſdemeanor, &c. the rule ought to be on Sir Samuel Astry: but here the queen being concerned in point of intereſt, it ought to be on Mr. Attorney-General (*a*). * [62] Note.

Fiſh *againſt* Horner. Caſe 94.

It was agreed, that if a plaintiff accept of an aſſignment of the bail-bond, and the defendant put in the ſame bail that were put in to the ſheriff at the return of the writ, the plaintiff cannot except againſt them; but it is otherwiſe where he has not taken an aſſignment. Bail to the ſheriff cannot be excepted to as bail above. Poſt. 117.

1. Salk. 97.
6. Mod. 62. Tidd's Pract. 135. 153.

Anonymous.

(*a*) The Court quaſhed the writ of *excommunicato capiendo*, and diſcharged the defendant, and refuſed to take any notice of the plea. S. C. 2. Ld. Ray. 818. S. C. poſt. 117.

Caſe 95.

Anonymous.

Debt lies on a judgment pending a writ of error.

Ante, 14.
Poſt. 140.

1. Mod. 79.
4. Mod. 314.
5. Mod. 68.
Ld. Ray. 47.
405. 1179. 1295.
Stra. 632. 867.
1186.

DEBT was brought upon a judgment in the court of common pleas pending *a writ of error*, and the writ of error pleaded in abatement.

To maintain the plea, the caſe of *Cremer v. Wickett (a)*, lately in this court, was cited.

But by POWELL, *Juſtice*, It has been often attempted, but never could obtain; and ſo, he ſaid, it had been reſolved by ALL THE JUDGES upon conſideration had: but he ſaid, the Court would diſcountenance ſuch proceedings; and therefore would not hold the party to bail.

(a) 1. Ld. Raym. 509. 12. Mod. 68. Sims v. Tims, 1. Show. 98. and 350.—And ſee Daſhwood's Caſe, 5. Mod. Dighton v. Glanvil, 4. Mod. 248.

Caſe 96.

Anonymous.

Time to plead in abatement.

2. Salk. 517.
Comb. 19. 251.
8. Mod. 43.
Stra. 523. 532.
1192.

UPON DEBATE about the time in which one might plead in abatement, MR. CLARKE, *the Secondary*, ſaid, that it had been ſettled here, that if a declaration be delivered the laſt day of a Term, the defendant ſhall have *four days* in a ſubſequent Term to plead in abatement; and if a declaration be delivered the laſt day of a Term as of a precedent Term, the party ſhall have *four days* after the actual delivery of the declaration to plead in abatement.

But POWELL, *Juſtice*, ſaid, that one could not plead as of a precedent Term without *imparlance (a)*.

MR. CLARKE anſwered, that he might enter it upon THE POST-ROLL without any *imparlance*, and then the plea is of that Term of which the declaration is.

AND NOTE, The declaration muſt be as of that Term in which bail is filed; and the defendant in another Term is not bound to accept a declaration as of a Term precedent.

And MR. CLARKE ſaid, that though by conſent the defendant does accept a declaration the laſt day of *Trinity Term* as of *Hilary Term*, yet he ſhall have four days in *Michaelmas Term* to plead in abatement.

(a) See Tidd's Practice, 240. 243.

*[63]

Caſe 97.

* Anonymous.

A *feme covert* indicted for a miſdemeanor ſhall not be bound with her bail.
Ante, 10.

Stra. 1120. 1122.

BRADFORD, a quaker-woman, being charged, on oath, with having publiſhed a book called "THE DUTCH CATECHISM," was bound to appear at THE OLD-BAILEY, and obliged to give four perſons bail in two hundred pounds each; but being *a feme covert*, ſhe was not bound herſelf.

Memorandum.

Caſe 98.

IT is a ſtanding rule of court, that in a country cauſe after an aſſize, or in a town cauſe after two Terms, the Court never ſtop proceedings upon a bail-bond upon filing common bail (*a*).

Stay proceedings on bail-bonds.

(*a*) In what caſes the Court will ſtay proceedings on bail bonds, ſee Tidd's Pract. 156.

The Queen *againſt* Lilly.

Caſe 99.

INDICTMENT FOR ASSAULT AND BATTERY, and taking out of the cuſtody of *A.* and *B.* ſeveral goods mentioned in the indictment, *quæ quidem bona* one *J. G.* ſerjeant at mace to *A.* and *B.* then ſheriffs of *London*, *virtute ejuſdem warranti*, to them duly made in that behalf, then had taken *in debitâ juris formâ*, by reaſon whereof they had the goods in cuſtody.

An indictment for reſcuing goods from a ſheriff's officer muſt lay the property in ſome perſon, and ſhew the judgment and execution under which they were taken.

THE FIRST EXCEPTION was, Becauſe it is not laid that the property of the goods was in anybody.

THE SECOND EXCEPTION was, Becauſe it is not ſaid that there was any judgment or execution thereupon.

8. Mod. 165. 248.
Ld Ray. 1032. 1381.

And for theſe exceptions it was quaſhed.

Lord Wharton *againſt* Sir John Robinſon, Knt.

Caſe 100.

A TRIAL AT BAR concerning boundaries of lands. The parſon of the one pariſh, the land lying in two pariſhes, was refuſed, becauſe he might enlarge his own pariſh, and by conſequence the tithes.

The parſon cannot give evidence on a queſtion relating to the bounds of his pariſh.

But one who about ſeven years before had taken the profits under the title of one of the parties, was received a witneſs, becauſe now he might plead the ſtatute of Limitation.

Ld. Ray. 1008. 1166. 1353. 1411.

1. Vern. 20. 159. 230. 254. 369. 2. Vern. 317. 375 472. 637. 699. Prec. Chan. 234. Fitzg. 80. 8. Mod. 60. 1. Peer. Wms. 288. 596. Stra. 34. 101. 129. 652. 728. 1229. See alſo Bull. N. B. 285. 1. Term Rep. 302. 4. Term Rep. 17.

Anonymous.

Caſe 101.

PER HOLT, *Chief Juſtice.* If *A.* be bound in a bond to *B.* to pay him twenty pounds when *B.* puts in his anſwer in chancery, there *B.* to bring action, ought to give *A.* notice of his having put in his anſwer.

On a conditional promiſe, notice of performance muſt be given.

Ld. Ray. 750. 1157.

* Thomkins *againſt* Hill.

Caſe 102.

IT WAS AGREED *by the Court*, that if any Judge of *niſi prius* allow or over-rule evidence which he ought not to do, upon application to the Court they will grant *a new trial*; for all writs of *niſi prius* are under the controul of the court out of which they iſſue.

If evidence be improperly admitted or refuſed, the Court will grant a new trial.

S. C. Holt, 704. Ante, 53. Poſt. 117. 6. Mod. 242. Tidd's Pract. 606.

Caſe 103. Withers *againſt* Harris.

If judgment be recovered in ejectment, and execution ſtayed upon terms until a year afterwards, a *ſcire facias* muſt revive the judgment before the *habere facias poſſeſſionem* can be iſſued.

S. C. ante, 50.
S. C. 1. Salk. 258.
S. C. 2. Salk. 600.
S. C. 3. Salk. 319.
S. C. Holt, 77. 265.
S. C. 2. Ld. Ray. 806.
S. C. 3. Danv. Abr. 331.
Ante, 5. 7. 29. 50.
Stra. 301.
Comb. 250.
Skin. 427.
6. Mod. 14. 288.
Todd's Pract. 720.

* [65]

3 Adol. & Ell. 680

JUDGMENT was given in *ejectment* upon terms, that there ſhould not be execution until ſuch a time, which was a year and a half after.

The ſole queſtion was, Whether this judgment could be executed without a *ſcire facias*?

MOUNTAGUE. It cannot; for in all caſes both of real and perſonal actions, if the plaintiff take not execution within the year and day, the plaintiff is put to have his *ſcire facias*. A year and a day is the time limited by law for many purpoſes for proſecuting his right; as to bring *an appeal*, to make claim on *a fine* by common law; and at common law, in a real action after judgment, if the party did not ſue execution within a year, he was put to a *ſcire facias*. In a perſonal action, he was put to a new action upon the judgment until the ſtatute of *Weſtminſter the Second* gave a *ſcire facias*. And the reaſon was, becauſe in that time ſeveral things might happen which would be a good bar of execution, if the defendant had opportunity to plead them, which opportunity is now allowed by the *ſcire facias*, but nothing is pleadable to a writ of execution (*a*). The reaſon why a *ſcire facias* lay at common law was, for that in a real action one could have no other advantage of his judgment; but in a perſonal action, where an action would lie on the judgment, no *ſcire facias* lay in that caſe: and he ſaid, that no reaſonable diverſity could be made between the caſe of *habere facias ſeiſinam* and this proceſs in this reſpect; for if a defendant in ejectment had any matter pleadable in bar of execution in one caſe, why ſhould it not be ſo in the other? And he ſaid, there was but one caſe that he could find that afforded the leaſt ground for ſuch diſtinction; and that is, the caſe of *Oakley v. Vicars* (*b*): it was a judgment in ejectment in the common pleas, and record brought hither by error within the year * and day, ſays the Book; but the Court took it to be after the year; the plaintiff in error died, and the plaintiff in ejectment took out execution without a *ſcire facias*, and a *ſuperſedeas* was prayed; and the Court ſaid, that though after the year there ought to be a *ſcire facias* to have execution of the damage, yet there needs none to have poſſeſſion of the land; and the Book takes notice, that it was ſaid at the bar, that the like judgment had been before given in another cauſe; but this was a cauſe where the defendant himſelf had brought a writ of error, and after, within a year, he died; ſo that it was not the fault of the plaintiff that execution was not ſued ſooner. And upon writ of error brought, if the plaintiff in error diſcontinue his writ, or it abates, or judgment be affirmed, though in the mean time above a year paſs, yet the plaintiff in ejectment ſhall not there be put to a *ſcire facias*; but where the plaintiff himſelf delays for a

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(*a*) Co. Lit. 191. a. 290. b.

(*b*) 1. Sid. 35. 2. Keb. 370.

year, he ſhall be put to a *ſcire facias* (*a*). In *Gernon's Caſe*, in debt upon an eſcape, in which the plaintiff declared on a judgment had by him againſt *A.* in the month of *June* before, and that he had proceeded againſt him until he had outlawed him, the defendant brought a writ of error, and the judgment was affirmed in the king's bench, and within the year the defendant *A.* was taken by a *capias utlagatum*, and the ſheriff ſuffered him to eſcape; and judged that the action did lie, and that he was in execution at the ſuit of the plaintiff immediately upon his being taken upon the *capias utlagatum* without any prayer, becauſe there were no laches in him; but if there had been laches in the plaintiff, there he had not been in execution without a particular prayer made by him to have him ſo in execution, as in caſe of judgment in debt: where there is a fine likewiſe for the king, if the defendant be taken upon a *capias pro fine* after the year, he ſhall not be in execution for the plaintiff without a prayer for that purpoſe, becauſe he had paſſed his time of a year and a day without taking out execution; but if he had been ſo taken within the year, he would be in execution at his ſuit preſently: and the reaſon of theſe caſes governs the caſe before quoted out of *Siderſin*; for the writ of error being by the defendant, which ſuſpended the execution until after the year and day, the plaintiff ſhall not thereby be put to his *ſcire facias*, there being no laches in him; and he quoted *Cro. El.* 416. 1. *Ro. Ab.* 899. *Cro. Jac.* 364. 15. *Hen.* 7. 5.

* [66]

Argument for the executor.

* PEERE WILLIAMS *contra*.

FIRST, He agreed, that if the plaintiff would recover his damages, he ought to bring a *ſcire facias* before execution of the damage after the year; for the day, he ſaid, was not material, for the damages are merely perſonal; and therefore, no execution can be of them in this caſe without a *ſcire facias*, as well as in judgment in debt.

SECONDLY, He held, that the plaintiff might go by way of *ſcire facias* if he pleaſe; but contended, that it was not neceſſary to do ſo. He ſaid, the queſtion in the caſe in *Siderſin*, before quoted, was, Whether a *ſcire facias* did lie? but it was allowed to be well without it (*b*). And he ſaid, an *habere facias poſſeſſionem* lay at common law after the year without a *ſcire facias*; for in all caſes where a man's writ was determined by a judgment, though he had paſſed a year and a day before execution, yet he had ſome benefit of his judgment; and therefore, if it were in debt, he had his action upon the judgment, being matter of higher nature than his firſt cauſe of action; if the action were real, he had a *ſcire facias*. But in this caſe of ejectment, if after the year he could not have an *habere facias poſſeſſionem*, he was without remedy; for it being a perſonal action, a *ſcire facias* did not lie before the ſtatute, and he could not have a new action upon his judgment; ſo he had no manner of advantage of his judgment if he had paſſed the year and day;

(*a*) Cro. Eliz. 706. 5. Co. 88.

(*b*) See Cole's Caſe, 2. Keb. 55.

which

WITHERS againſt HARRIS.

which was very abſurd. And the reaſon of a *ſcire facias* in a real action at the common law was, for that the party might have a releaſe or other matter to plead; and it was thought hard in ſuch caſe to ſuffer execution to be without an opportunity of pleading, becauſe thereby the freehold is not only diveſted, but the party put to an action of an higher nature, which ſometimes the nature of his caſe does not allow of. But that reaſon holds not in ejectment, for the worſt that can be is, to bring a new ejectment, which is determined within the half-year at moſt. He ſaid, it was a common courſe of mortgages, for the more ſpeedy getting poſſeſſion, to give judgment in ejectment; yet if, after the year, he ſhould be put to his *ſcire facias* upon ſuch judgment, it could be of no great uſe to him. And he ſaid, that after judgment one might enter and execute his own judgment; and that the aſſiſtance of the ſheriff was only to keep the peace. 2. *Sid.* 156. 1. *Ro. Rep.* 313. *Noy*, 71. *Palm.* 363.

* [67] * HOLT, *Chief Juſtice.* As to the taking of judgment in ejectment by a mortgagee, it is a thing not to be much encouraged, and I never knew anybody uſe it but one; and what difference can there be between this and a real action? for *quoad* the term and poſſeſſion, it is real. At common law, if one had a term of twenty years to come, and were turned out, his remedy was *ejectment.* As *aſſize* or *writ of right* was for *a diſſeiſin* of the fee-ſimple or freehold, ſo *ejectment* was his remedy when ouſted of his term, and a recovery in ejectment bound the term and right of it; for if there were a recovery by *A.* againſt *B.* it bound him, and he could not falſify it, but the recovery made him a good title; and ſo in ejectment, a recovery made a good title; and neither the party againſt whom it was had, nor his heirs, could falſify it. Now if the recovery were in a real action, you cannot ſue execution until after the year without a *ſcire facias.* And why not ſo in an ejectment? For if you have a judgment, and you let it lie ſtill a year and a day, and it be not hindered by a writ of error (for in ſuch caſe, if the plaintiff be nonſuited, or the writ abate, or judgment be affirmed, he may have execution without a *ſcire facias*), you ſhall not execute it after the year without a *ſcire facias.* And as to the ſtatute of *Weſtminſter the Second*, he ſaid, he was not ſatisfied with *Coke*'s inference from it, that no *ſcire facias* did lie upon a judgment in a perſonal action; for that does not ſeem to have been ſo; for the ſtatute begins with its enumerations where it gives a *ſcire facias.* Firſt, Of records before ſuch as had power to take ſuch records as recognizances, and then fines executory, *ſive contractus*, *ſive conventiones*, *ſive obligationes*, *ſive ſervitia aut conſuetudines recognita*, *ſive alia quæcunque irrotulata*, &c. *Vide* 1. & 2. *Co.* and many other books. By *Coke's* own rule, where one begins a graduate enumeration of particulars, and concludes with theſe general words, *et alia*, the general words ſhall comprehend nothing but what is of an inferior nature to the firſt degree or particular of his enumeration; and here to bring in a judgment had in the court above under the *et alia* would be contrary to that rule.

But without doubt it lay at common law in real actions; and why ſhould the law differ in the caſe of ejectment from any other caſe? I can find no reaſon for it. The party has delayed himſelf by not ſuing execution in time; and the right of a term is as much bound by a judgment in ejectment as the right of land is in a judgment in a real action * concerning the freehold or inheritance, and none * [68] can falſify ſuch recovery, or recovery in a real action, but the iſſue in tail by the ſtatute *De Donis*; and that only indirectly, as by ſaying that it was by default, if the truth be ſo; but he cannot directly falſify it in the point tried; as that there was a faint title and no evidence; but a ſtranger to a recovery in a real action may falſify, and ſo he may in ejectment: and I ſee no inconvenience to put them to a *ſcire facias*, and I do believe it is not uſual; for either the party takes execution preſently within the year, or he is delayed by writ of error; if the latter, he may have execution after the year, Ante, 5. or he has ſued execution within the year, and continued it by a *vicecomes non miſit breve*. If there be two plaintiffs in a perſonal Ante, 39. Poſt. 94. Ld. Ray. 695. 766. 849. 869. action, and one of them dies, that ſhall not put the other to a *ſcire facias*, or if one of the defendants die; therefore likewiſe a *ſcire facias* is not neceſſary, becauſe the ſame party ſtill remains on record; and this has been lately adjudged upon ſolemn debate here(*a*). I doubt whether, if there be a real action, and judgment thereupon, and the tenant dies within the year, whether there can be execution there without a *ſcire facias*, though it be within the year: and I do not know any authority in point of it: in perſonal action he ſhall not, becauſe execution is had againſt the party defendant, and you ſay in the writ *fieri facias de bonis et catallis* of the defendant, which cannot be after his death; or *capias* his body, which cannot alſo be after his death. An *elegit* is *de terris tenementis bonis et catallis* of the defendant: but in real action you ſay nothing but *habere facias ſeiſinam*; therefore it ſeems to me, that execution may be there had within the year, though tenant die, without a *ſcire facias*; and therefore you ſee *Shelly's Caſe*, where the tenant died in the morning the common recovery was had; but that caſe does not come up to my purpoſe, becauſe there the writ of execution might be *teſted* of that day. If in perſonal action execution be ſued out, the death of the defendant ſhall not bar the execution of it; but if it were not out, there muſt be a *ſcire facias*. But if demandant die within the year and day, there muſt be a *ſcire facias*, becauſe they are other parties who ſue the execution; and, whether in ejectment after death of defendant within a year you can ſue execution without a *ſcire facias*? is the queſtion. But it ſeems you may; becauſe in the writ of *habere facias poſſeſſionem* you do not ſay againſt whom the execution is to be had, but it is only to * have the poſſeſſion; but after a year and day there * [69] ought to be a *ſcire facias*, not only againſt the defendant, but alſo againſt the terre-tenants.

(*a*) See Moor, 367. Carth. 112. 193. 330. 1. Show. 402. and Tidd's Practice, 3. Ld. Ray. 244. 1. Salk. 319. 5. Mod. 723.

WITHERS *againſt* HARRIS.

POWELL, *Juſtice*, agreed, that there ought to be a *ſcire facias*, and that there was no difference between this and other caſes; but as to *Coke's* opinion upon the ſtatute of *Weſtminſter the Second*, that before the ſtatute it did not lie in perſonal actions, he ſaid, the law had been ſo taken ever ſince; and he ſaid, the judgment in ejectment is not of *the poſſeſſion*, but of *the term*; and it was the higheſt writ a leſſee for years could have; and in a writ of annuity there muſt be a *ſcire facias* after the year at common law; but he agreed, that if a writ of error be brought and ſuperſeded, or the plaintiff be nonſuited, or it abate and judgment be affirmed, there, after the year, a plaintiff ſhall not be put to a *ſcire facias* to have execution. And he ſaid, that in the common pleas they never took poſſeſſion upon a judgment in ejectment without a *ſcire facias* after the year: and he ſaid, where one took judgment in ejectment for ſecurity of his mortgage, he may ſecure his execution after the year, by taking execution out within the year, and entering *vicecomes non miſit breve*: and this he ſaid was my *Lady Allibon's Caſe* (*a*).

Of this opinion were the other two Judges.

Lut. 5. 7. 50. HOLT, *Chief Juſtice*, declared, that he ſubmitted to *Coke's* opinion, though he ſaw no reaſon for it. And he ſaid, that a writ of error did not ſuperſede the poſſeſſion, or hinder the party of his entry, if it were lawful before; it does indeed lie upon the hands of the Court, that they cannot award execution; but the party may enter if he will; and that has been lately reſolved in the caſe of *Badger v. Lloyd* (*b*).

The execution was ſet aſide as irregular, and reſtitution granted (*c*).

(*a*)

(*b*) Holt, 199.—And ſee Taylor *v.* Cole, 3. Term Rep. 293.

(*c*) See S. C. poſt. 177.

Caſe 104.

Newſon *againſt* Bawldry.

The Court will direct a plea to a declaration in prohibition to be *amended*, in order to bring the queſtion to be tried regularly before the Court.

DECLARATION IN PROHIBITION for libelling in the ſpiritual court for the payment of a pariſh-rate, made at an aſſembly of twenty pariſhioners, fifteen whereof were againſt the rate, and five only for it; and that the money was expended in repairing THE CHANCEL and railing it, and raiſing the floor ſome ſteps higher.

* [70]

S. C. Sett. & Rem. 259.
Poſt. 121.
1. Salk. 164.
Ld. Ray. 59.
2. Pr. Wms. 125.
Stra. 576.

It was pleaded, that THE COMMUNION-TABLE was, *ab antiquo*, placed in THE CHANCEL, and that there were ancient rails about it which were out of repair; that at a meeting of a majority of the pariſhioners the rate was made to replace THE COMMUNION-TABLE in THE * CHANCEL, and to repair the ſaid rails: the plea alſo contained ſome other things which were thought decent to be done at that aſſembly.

But the matter being ill pleaded, they were directed to amend their plea, in order to bring the following points in judgment:

NEWSON *againſt* BAWLDAY.

FIRST, Whether if the communion-table were not in the chancel before, or if there were no ſteps up to it, and the pariſhioners on a meeting do not find that ſo decent, the majority of them can make a rate to oblige all for altering the place of the communion-table, or carrying it into the chancel, or for raiſing it higher?

The majority of pariſhioners at a veſtry may bind the whole pariſh in removing the *communion-table.*

1. Salk. 164.
3. Com. Dig. "Egliſe" (G. 3.).

And THE COURT inclined they could; for as to the degrees of order and decency there is no rule, but as the pariſhioners agree among themſelves; and though they are compellable to put things in decent order, yet there is no rule for the degrees of decency but the judgment of the majority.

SECONDLY, Whether a majority of pariſhioners may make a rate to bind the reſt for repairing or adorning THE CHANCEL? for that is the ſpecial freehold of the parſon.

Quære, Whether *the veſtry* can make a rate to repair and adorn the chancel of the church.

CHESSHYRE here quoted the caſe of *Roſe v. Hawkins* in this court (*a*), where a libel was for a pariſh-rate to repair a church and chancel, and a prohibition granted for two reaſons; one, becauſe the chancel ought to be repaired by the parſon; the other, for that it was ſuggeſted the rate was not made by a majority; yet becauſe they had not gone to try that point below, THE COURT ſaid it was no cauſe.

2. Inſt. 489.
1. Salk. 165.
2. Roll. Abr. 337.
Hob. 66.
3. Mod. 264.
3. Burr. 1689.

(*a*) 9. *Will.* 3.

Fenwick *againſt* Gravenor.

Caſe 105.

FENWICK, pretending the defendant to be his wife, delivered ejectments to the tenants, and ſhe, denying the marriage, prayed to be made defendant.

A wife may be made defendant in ejectment, where a pretended huſband is leſſor of the plaintiff.

It was oppoſed by the plaintiff's Counſel, for that if ſhe ſhould have judgment he would loſe his coſts, ſince he could have none againſt his wife.

HOLT, *Chief Juſtice.* It is due of right to the *tenant in poſſeſſion* and *landlord* to be made defendants; for otherwiſe the *tenant in poſſeſſion* might combine with the *leſſor of the plaintiff* and ouſt *the landlord* of his rent (*a*); and to deny the lady that right would be upon the preſumption of her marriage, which would be directly to determine the point in queſtion; and there is no inconvenience of the other ſide; for the plaintiff, if he * has judgment, may have coſts againſt the tenants in poſſeſſion.

S. C. poſt. 121. 156.
S. C. 1. Salk. 257.
S. C. 2. Salk. 650.
S. C. Holt, 265.
Poſt. 121. 156.
Salk. 6.

* [71]

(*a*) And ſee 11. *Geo.* 2. c. 19. ſ. 12. 3. Burr. 1301. and Runnington's Ejectments, 2d edit. 168.

Caſe 106.

Shortridge *againſt* Lamplough.

Entered in C. B. Michaelmas Term, 10. *Will.* 3. *Roll* 659.
In B. R. Trinity Term, 12. *Will.* 3. *Roll* 454.

If a reverſioner *bargain and ſell* the lands leaſed, and then releaſe his intereſt in the reverſion, ſuch releaſe ſhall be intended to be to the uſe of the *releaſee* and his heirs, although no conſideration is expreſſed for the releaſe, nor any expreſs uſes limited thereon.

S. C. 2. Salk. 678.
S. C. 3. Salk. 386.
S. C. Holt, 621.
S. C. 2. Ld. Ray. 798.
S. C. Lutw. 351.
Gilb. Uſes, 270.
Poph. 47.
Moor, 688.
2. Atk. 148.
1. Vern. 40. 141. 415.
Ld. Ray. 155. 160. 235. 289. 801. 854. 876.
Fitzg. 301.
9. Mod 176.
Stra. 934.
2. Fonb'. Eq. 138.
Saund. on Uſes, 133.

ERROR OF A JUDGMENT in the common pleas, in an action of covenant upon a deed of the leſſee, brought by the aſſignee of the reverſion.

The covenant was to build ſeveral houſes on the premiſes.

The caſe was this: *Thomas Aſtley*, ſeiſed of the reverſion of the lands leaſed, did bargain and ſell the ſame to *John Griffiths* for a year, in conſideration of five ſhillings in hand paid; and afterwards releaſed all his right, title, and intereſt in the reverſion to *John Griffith* and his heirs, but did not ſhew that there was any conſideration for the releaſe, or that there was any expreſs uſes thereon limited.

IT WAS URGED *by the defendant*, that the releaſe muſt have enured to the uſe of the releaſor, and by conſequence the plaintiff has no title to the reverſion, and by conſequence not to this action.

And for this cauſe, there was *a demurrer* to the declaration, and a judgment for the plaintiff, and a writ of enquiry executed, and final judgment in the common pleas.

And A WRIT OF ERROR being brought,

RAYMOND, *for the plaintiff in error*—After uſes came to be practiſed in the time of *Edward the Fourth* and *Henry the Sixth*, during the quarrels of the families of *York* and *Lancaſter*, and all along until the time of *Henry the Eighth*, the ſtate of the land and the uſe were two ſeveral things, and one might diveſt himſelf of the eſtate and keep the uſe, or *vice verſa*, or give the eſtate to one, and the uſe to another; and if he had made a conveyance of his lands without a conſideration, or any expreſs uſe limited, the conveyance was to his own uſe: and this was the law until 27. *Hen.* 8. c. 10. as appears both by practice and the authority of books. The queſtion then will be, What alteration the ſtatute of *Henry the Eighth* has made? The intent of that ſtatute was to deſtroy uſes, by drawing the poſſeſſion to them and not them to the poſſeſſion, ſo that ſince that ſtatute the uſe draws the legal eſtate to it (*a*). If a man at this day make a feoffment in fee to another and his heirs generally, without declaration of uſe or conſideration, it ſhall be to the uſe of the feoffor; ſo of fine or recovery, and all other conveyances. *Vide Dyer*, 146 in point, in the caſe of a feoffment; for he ſays, if there be no conſideration * appearing, or uſe expreſſed upon a feoffment, it ſhall be intended to be to the uſe of the feoffor (*b*). When one makes a feoffment to particular uſes,

* [72]

(*a*) See 1. Co. 125. 2. Bl. Com. 333. Saunders on Uſes, 125. 127.

(*b*) See 2. Roll. Abr. 781. Cro. Jac. 20. Caſtle *v.* Dodd, Co. 58. Latch, 82. in Recovery. Palm. 462. Co. Lit. 23.

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ſo much of the uſe as he does not diſpoſe of remains in him as his old uſe: and he ſaid that there was no difference when there were particular uſes limited and no uſe at all; for what draws the uſe out of feoffor? It is either the conſideration, or the expreſſing it to be to the uſe of another; and that reaſon holds in both caſes, whether of a general feoffment or a feoffment with particular uſes. In the caſe of *Godbold v. Freeſtone (a)*, held that there was no difference between, where one ſeiſed in right of his mother makes a feoffment in fee to the uſe of himſelf and his heirs, and where he makes it generally without limiting any uſe, for that in both caſes he ſhall be in of an eſtate deſcendible to the heir of part of the mother, for in both caſes the old uſe remains ſtill in him; and the ſame rule will hold in this caſe of a releaſe, without any conſideration or expreſs uſe; the old uſe will ſtill remain and be in the releaſor, becauſe the uſe and eſtate are diſtinct, and though the eſtate paſs, the uſe does not, without a conſideration or expreſs limitation of it; and they are as much diſtinct things in a releaſe, as in any other conveyance: and the precedents are, that when a releaſe is pleaded, there always mention is made of a conſideration or expreſs uſe (*b*). There are indeed many caſes, where they were not ſo pleaded; but they paſſed *ſub ſilentio*, and therefore not to be regarded ſpecially, being againſt the reaſon of the law. In the caſe of *Edwards v. Morgan (c)*, covenant was brought by an aſſignee of a reverſion, to which grant the tenant attorned for non-payment of rent; and the book ſays, that judgment was ſtayed for an apparent fault in the declaration, becauſe it was not ſaid to whoſe uſe the reverſion was, or any conſideration of the grant mentioned; and this he relied on, as an authority in point.

But note, The caſe in the book mentions the grant to have been upon conſideration mentioned in another deed, which deed not appearing was conſidered as if there had been no conſideration at all; and then it appears to be the intent of the party, that there ſhould be a conſideration; which not being, it cannot be thought that his intent was to paſs it without any conſideration.

Leaſe and releaſe.

* It is objected, that a releaſe enures by way of enlargement of eſtate, and a leaſe and releaſe make but one conveyance in law; ſo that there being a conſideration, that ſhall run through, and be communicated to the eſtate enlarged. But in anſwer; Surely they are diſtinct conveyances; the one operates by the ſtatute of Uſes, the other by the common law; they are indeed ſo far one conveyance, that the whole eſtate paſſes by them both, and the eſtate for years is merged and gone by the releaſe coming upon it, being to the ſame perſon; but indeed if the releaſe were to the uſe of another, or returned back to the releaſor, the eſtate for years would not be merged, becauſe of the ſaving in the ſtatute of 27. *Hen.* 8. c. 10. ſaving rights of other perſons.

(*a*) 3. Lev. 406.

(*b*) 2. Saund. 11. 277. 2. Vent. 120. Co. Ent. 264. 220. 474.

(*c*) 3. Lev. 233.

WELLS *contra*. He agreed, that in all ſorts of conveyances, if there be not a conſideration or uſe expreſſed, or neceſſarily implied, the uſe ſhall remain in the conveyancer, and ſhall draw back the eſtate to it (*a*). The intent of the parties is moſt to be conſidered in the raiſing of uſes; and therefore if there be but a penny paid by him to whom the conveyance is made, it will raiſe the uſe to him, without any declaration; not ſo much for the conſideration, as that the payment of the penny ſhews the intent of the parties to be, that he who gives the penny ſhall have the uſe (*b*); for there can be no reaſon why a man ſhould give even the leaſt ſum of money to another, to make a conveyance of his eſtate, to have it back to himſelf again. So if a feoffment be with intent to make one a tenant to the *præcipe*, to have a recovery ſuffered againſt him, the tenant to the *præcipe* ſhall * have the eſtate to his own uſe, otherwiſe he could not be right tenant to the *præcipe*, to have a recovery ſuffered againſt him; and the deſign of ſuffering the recovery, was the intent of the party at the time of the feoffment. Nothing paſſes by *a releaſe* to the leſſee in poſſeſſion, but by way of enlargement of the eſtate of the leſſee; for it does not operate to give a new eſtate of the reverſion, but to encreaſe the eſtate in poſſeſſion according to the words of it. So it does not work by merger of the firſt intereſt, but by enlarging of it; but it is true, that after the releaſe, the leaſe does not exiſt diſtinct from the eſtate by the releaſe; for though it do not continue as a term, yet it is part of the intereſt that he now has in him by the releaſe; for it is not like a grant to a particular tenant by him in reverſion, which drowns the particular eſtate. So that if the releaſe enures only to enlarge the eſtate, the intereſt enlarged muſt be to the uſe of leſſee for years, or it cannot be ſaid to be an increaſe of it; and indeed, if the practice had not prevailed to the contrary, it were very odd to limit the uſe of a releaſe to any but him who has the leaſe. It is for that we find the clauſe in leaſes, on which the party intends to build a releaſe, that the intent of the leaſe was to paſs an eſtate by releaſe upon it, for the benefit or uſe of a third perſon. It would be abſurd to ſay, that my conveyance ſhould have no other operation, but to extinguiſh or merge the eſtate that the grantee has already, to have it brought back to me; and what need could there be of ſuch a way? If the party had any ſuch intent, it might be ſoon done by *ſurrender*. If it had been expreſſed in this deed, that he had already made him a leaſe for years, and that for the enlargement of that eſtate he made this releaſe, there had been no doubt but that the releaſe was to his uſe; and there is no difference between the caſes, ſince this releaſe in its own nature enures by way of enlargement. Beſides, here is alſo a valuable conſideration; for the leaſe and releaſe being but one conveyance, the five ſhillings that are the conſideration of the leaſe ſhall be participated to the releaſe; and alſo the acceptance of the releaſe is in its own nature a releaſe, for it implies an

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(*a*) See Lloyd *v.* Spillet, Bar. E. R. 384.

(*b*) See Salk. 676. Holt Rep. 736, 737. Moor, 248. Dyer, 166.

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alteration of the eſtate of the leſſee, which to conſent * to is a conſideration moving from leſſee; and the only motive of the leſſee's parting with the old eſtate was to get a new one. He who takes a releaſe by way of enlargement of eſtate muſt not only have the intereſt, but alſo a privity of eſtate between him and the releaſor. If *A.* make a leaſe to *B.* and he make an under-leaſe over, and *A.* releaſes all his right to the under-leſſee and his heirs, it is void, as to enlarge the eſtate for want of privity (*a*); ſo that it is a privilege inſeparably incident to him who has a privity in eſtate to be capable of a releaſe of enlargement; and that is ſo for the benefit of releaſee.

RAYMOND ſaid, the firſt leaſe could not be ſaid now to have continuance; for after the leaſe, if the leſſor before the leaſe had ſuffered judgment and releaſed, the judgment would have attached before the releaſe.

Queſtion and opinion upon the pleading, and touching uſes.

HOLT, *Chief Juſtice.* The queſtion is, Whether the ſtatute of 27. *Hen.* 8. c. 10. has altered the ancient way of pleading? For this manner of pleading was good before the ſtatute, without doubt; and it appears by many precedents ſince the ſtatute, that this way was uſed, even in the caſe of a *feoffment:* and it was thought ſufficient to alledge the eſtate in the feoffee, without any more. A feoffment in fee was pleaded, *virtute cujus* he was ſeiſed without any more ado (*b*); and ſo there are many other caſes ſince the ſtatute in *Coke's Entries*, though there be no conſideration or uſe expreſſed; yet it does not follow that it is to the uſe of the feoffor, for that is matter of fact extrinſecal to the deed. If ſince the ſtatute of *quia emptores terrarum*, a feoffment were made by * deed, without conſideration or uſe declared in the deed; yet the uſe might be declared by parol, until the ſtatute of 29. *Car.* 2. c. 3. of Frauds and Perjuries; and even ſince that ſtatute, it may be declared by writing only without ſeal. Now for us to conſtrue a deed to be to the uſe of feoffor, when it might be to the uſe of feoffee, for anything that appears, would be very odd, therefore we ſhall intend it to be to the uſe of the feoffee, if no more appear; and if it were not ſo, it ought to come on the ſide of the feoffor or grantor, by averment that there was no uſe limited to the feoffee, that is to confeſs the feoffment when it is pleaded; but to avoid the effect of it by averment, and eſpecially in caſe of a feoffment or releaſe to a feoffee or a releſſee and his heirs, without limiting any particular uſe; for if it be not taken to be to the uſe of feoffee or releſſee, the conveyance cannot be of any uſe at all; for it cannot be thought, that one would be at the trouble and charge of any of theſe conveyances, to be ſeiſed juſt in the ſame manner as he was before, and of the very ſame eſtate; for if he had a warranty to the firſt eſtate, he ſhall have advantage of it, if he ſhould be impleaded for the reſulting eſtate: if he were ſeiſed as heir of the part of the mother before, he would be ſo after; but before the ſtatute of *Henry the Eighth* ſuch conveyance might

* [76]

(*a*) Co. Lit. 273. a.

(*b*) Plowden, 478.

be of ſome uſe, though no uſe were declared upon them, *videlicet*, to cheat the lord and hinder tenants to *præcipe's* from being known, &c. But now it cannot be intended to have been to any other purpoſe but to paſs the uſe and eſtate, where there is no alteration made, and therefore it ſhall be intended to the uſe of the feoffee, &c. if the contrary be not ſhewn on the other ſide by averment: and the authority in *Coke upon Littleton* does not contradict this; for it ſays, "where there is a feoffment in fee made, and ſome "particular uſe limited, ſo much of the old uſe as is not limited "over remains in him, as his old uſe;" for there it appears by limiting the particular uſe, that the feoffment was made to another perſon, than to grant an eſtate to the feoffee, TO WIT, to raiſe the particular uſe; but where there is no reaſon appearing, it ſhall be intended to the uſe of the feoffee, if the contrary be not made out on the other ſide.

POWELL, *Juſtice*, *ad idem*. And he ſaid, that he was not ſatisfied that the nature of the conveyance would admit of a reſulting uſe; for though it be a conveyance much uſed now, to raiſe uſes upon to a third perſon by expreſs words, yet in ſtrictneſs * it is a common-law conveyance. And if a leaſe be made for forty years, and a releaſe thereupon without conſideration or limiting of any uſes, ſurely it cannot be intended to be to the uſe of the leſſor; for the very extinguiſhing the eſtate of the leſſee is a good conſideration; and ſuppoſe it were a confirmation, ſurely it would be the ſame.

* [77]

But THE CHIEF JUSTICE and HE ſaid, that if there were a particular uſe limited on the releaſe, the reſt would reſult back.

GOULD, *Juſtice*, ſaid, that he himſelf had taken the like exception in the common pleas, in the caſe of *Reginald and Biſhop of London v. Pratt (a)*, but was over-ruled by the whole Court; and he quoted *Lit. fo.* 267. *Vaughan*, 44. *Lit.* 3. 459.

The judgment was affirmed.

A writ of enquiry may recite the declaration *in hæc verba.*

RAYMOND farther took exception to the writ of enquiry; for he ſaid there was *a variance* on which the judgment was, and that recited on the writ of enquiry; and therefore it cannot be a right of enquiry, nor a writ of enquiry for their judgment. The writ of enquiry does not ſet it out *in hæc verba*, but by way of recital; and then it recites all in the preſent tenſe, inſtead of the preterperfect, as it ought; and they give damages to the *teſte* of the writ of enquiry, when there ought to be enquiry to the time of the action brought: and he compared it to the caſe of *Saund.* 169. where the verdict gave damages for loſs of ſervice after declaration brought, and for this the judgment was reverſed (*b*).

(*a*) 7. *Will.* 3. Roll 430.

(*b*) See Hob. 189. and the caſe of Parce v. Molten, in Trinity Term, 9. *Will.* 3. 2. Show. 42. 82. Ld. Ray. 1382.

HOLT, *Chief Juſtice.* You would have the writ of enquiry bad, becauſe you ſay it gives damages to *the teſte* thereof, when it ſhould only be to the time of declaration or bill. The writ directs the ſheriff to take inquiſition what damages the plaintiff had by virtue of the breach of covenant, and not for the houſes being out of repair at the time of the action brought. Suppoſe the houſes were out of repair at the time of the action brought, and become more out of repair before judgment, and writ of enquiry, the jury that enquires ought to give the party, not ſuch damages as would put them in repair at the time of the action brought, but ſuch as would be enough to put them in repair at the time of the enquiry.

SHORTR[illegible]E *againſt* LAMPLOUGH.

Ld. Ray. 4. 411. 536. 1125. 8. Mod. 243. Stra. 1131. Gilb. Eq. Rep. 195.

Goodwin *againſt* Hilton. Caſe 107.

THE ATTORNEY-GENERAL alledged, and it was not denied by THE COURT, that before the two *ſcire facias's* returned, the bail may diſcharge themſelves by render of their principal.

Bail may render the principal before return of *ſcire facias.*

Cro. Eliz. 618. 1. Ld. Ray. 157. 6. Mod. 238. 8. Mod. 340. 1. Wilſ. 270. 1. Stra. 198. 4. Burr. 2134. 5. Term Rep. 534. Tidd's Pract. 144.

Per HOLT, *Chief Juſtice.* The *reddidit ſe* cannot be entered upon the bail-piece; for the *ſcire facias* is grounded upon that, and the *reddidit ſe* would deſtroy it; but the remedy of a bail is upon an *audita querela* to be grounded on the *reddidit ſe.*

Reddidit ſe cannot be entered on the bail-piece.

S. C. poſt. 97.

Ante, 51. 6. Mod. 132. 231. 238. 309. Comb. 4. 2. Show. 79. 147. 398. 443. 3. Salk. 57. 158. Ld. Ray. 156. 721. 1097. 1177. 1452. 1467. 8. Mod. 194. 240. 280. 365. Stra. 419. 443. 781. 872. 1270.

And PER CURIAM, If the render appear to be fraudulent, though it has the outward ſhow of a real one, that will not diſcharge the bail, as if there be a previous agreement to let him eſcape, while he ſhould remain in cuſtody of THE TIPSTAFF.

A fraudulent ſurrender will not diſcharge the bail.

Bar. 70.

S[illegible]llon's Pract. 182.

And it was offered at THE BAR, to have been ruled in the caſe of *Lee v. Knipe (a)*, that the principal ought to be two days in cuſtody, before an entry ſhould be made of a *reddidit ſe.*

When the *reddidit* ſhall be entered.

Tidd. Pract. 155.

And here it was agreed PER CURIAM and THE ATTORNEY-GENERAL, that the bail may render their principal pending a writ of error, though during that time the plaintiff cannot charge him in execution.

Bail may render pending error.

Tidd's Pract. 144.

But ſee the caſe of *Wickſtead v. Bradſhaw* (*b*), which was quoted *contra.*

(a)

(*b*) Hob. 116.

The

Caſe 108.

The Queen *againſt* Smith.

In a conviction for ſtealing deer in the king's foreſt, it is not neceſſary to ſhew in what capacity THE KING is ſeiſed of the foreſt, for he is preſumed to hold all his property in right of the Crown.

CONVICTION on the ſtatute of Deer-ſtealing in the king's foreſt of *Rockingham.*

The killing was in the time of *King William the Third*, and the conviction in the time of *Queen Anne.*

* BRODERICK objected, that it was neceſſary to ſhew in what capacity the king was ſeiſed of the foreſt; for by the ſtatute, a third part of the penalty is given to THE KING. And therefore if the king was ſeiſed in his *natural capacity*, it ought to go to his executor; if in his *politic capacity*, it ought to go to THE QUEEN.

* [78]

S. C. 1. Salk. 377. Foſt. 129. 2. Salk. 147. 182. 6. Mod. 83. Ld. Ray. 582. 2. Vern. 441.

HOLT, *Chief Juſtice.* The king can have nothing in his natural capacity, if it be not in right of his *Dutchy* (a), or an eſtate-tail by the ſtatute of *Donis* (b); for if the king purchaſe lands to him and his heirs, he ſhall have it in his *politic capacity.* And wherever the king is ſaid generally to be *ſeiſed*, it ſhall be intended a ſeiſin *jure coronæ*, and Dutchy-lands would now be in the queen, if they were not kept ſeparate by act of parliament (c). And if the queen ſhould create a *Duke of Lancaſter* at this day, he would not of conſequence have the Dutchy-lands: and further, it is not material upon the conviction or judgment who ſhall have them.

In an information for hunting deer in a foreſt, it is ſufficient to ſtate generally that it was without the conſent of the keeper.

ANOTHER EXCEPTION was, that the conviction laid the killing to be in the foreſt of *Rockingham*, where deer were *uſually* kept, and without the leave or conſent of any intruſted with the keeping of the ſaid foreſt or the ſaid deer; and a foreſt has many walks and officers, and it ought to exclude the leave and conſent of any of them.

Ld. Ray. 584.

HOLT, *Chief Juſtice.* It has been indeed held, that Judges are not bound to take notice of the law of the foreſt *ex officio*; but I know no reaſon for that. But if you had leave of any particular keeper of any particular part of the foreſt, you could not be found guilty; for leave of a deputy is leave of a principal.

And the conviction was affirmed.

Caſe 109.

Rigaut *againſt* Galliſard.

Trinity Term, 1. *Anne*, *Roll* 121.

The ſpiritual court cannot take cognizance of *ſolicitation of chaſtity*, if the offence was accompanied with ſuch force as will maintain an action of aſſault and battery at common law.—S. C Holt, 597. S. C. 2. Salk. 552. S. C. 2. Ld. Ray. 809. 2. Inſt. 487. Ld. Ray. 103. 1101. 8 Mod. 114. Stra. 187. 471. 545. 576. 823. 1100.

DECLARATION UPON A PROHIBITION, that at the ſeſſions of the peace held at *Weſtminſter* ſuch a day and year of *King William the Third*, the plaintiff was indicted for making an aſſault

upon

(a) Dyer, 209. pl. 22. Plowd. 212. 223.

(b) See Co. Lit. 15, 16.

(c) The lands and poſſeſſions of the *Dutchy of Lancaſter* are ſeparated from the Crown by a charter of *Henry the Fourth*, made by authority of parliament. 1. Keb. 643. T. Raym. 90. Plowd. 214. Lutw. 1235. See alſo the ſtatutes 27. *Hen.* 8. c. 11. 27. *Hen.* 8. c. 16. 2. & 3. *Philip & Mary*, c. 20.

Rigaut againſt Gallisard

upon one *Louiſe Rigaut*, the defendant's wife, with intent to have a carnal knowledge of her; and it was laid to be *againſt the peace* of the late king, &c. and that likewiſe the now defendant brought an action of aſſault and battery againſt him in *Trinity Term*, in the twelfth year of the late king, which was likewiſe laid to be *contra pacem*, which ſuit is ſtill depending; and yet the ſaid defendant has ordered him to be ſued in the *Biſhop of London*'s court, for ſolicitation of the ſaid *Louiſe Rigaut's* chaſtity to commit adultery with him.

* [79]

* The defendant pleads for *a conſultation*, that he is not charged below for any of the crimes charged in the indictment or action.

And to this plea there is a demurrer.

Mountague *for a conſultation*. This is a matter whereof they have proper conuſance; for by THE LIBEL it appears to be *crimen incontinentiæ* in the particular of ſoliciting a married woman to commit adultery with him. The words of the ſtatute of *Circumſpectè Agatis* are, "*non puniendo eos ſi placitum tenuerint*, &c. "*de his quæ ſunt merè ſpiritualia*, VIZ. *de correctionibus quas* "*prælati faciunt pro mortali peccato*, VIZ. *pro fornicatione, adul*"*terio et hujuſmodi* (*a*)." And it appears by the word "*hujuſ*"*modi*," that they have conuſance of things of leſs nature than *fornication*, as *ſolicitation of chaſtity*; and of higher, as *inceſt*. And the reaſon is, that the common law takes no notice but of facts committed, whereas the civil canon law puniſhes intentions if wicked; and they go upon THE RULE, that "a man muſt not look after a "woman to luſt after her;" for if they will carry that deſire further, as to endeavour, though by fair means, to put their deſire in execution, they will puniſh them.

Secondly, The queſtion is, Whether the indictment and conviction for the aſſault and battery, and the action depending, will alter the caſe? They are ſeveral proſecutions in their nature and deſign: The *indictment* is to entitle the king to a fine for the breach of his peace, and ill example to his ſubjects in the aſſault; and the end of *the action* by the huſband and wife, is to recover damages for the particular injury done to them; and for each of theſe, the puniſhment is corporal or pecuniary: But *the ſuit* below is for reformation of his manners and ſalvation of his ſoul; and if he be convicted below, he is only to do penance, which by commutation may be changed into money, as the ſtatute of *Circumſpectè Agatis* allows; and an action may be brought in this court for the ſum commuted for (*b*). So the one law puniſhes the wickedneſs of the mind; the other, wicked acts; as in caſe of laying violent hands upon a clerk (*c*). And the maxim of "*nemo debet bis puniri* "*pro eodem delicto*," does not hold in this caſe; for that is to be underſtood,

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(*a*) 2. Inſt. 487, 488.

(*b*) See the ſtatute *Articuli Cleri*, c. 6. "*Quando eadem cauſa diverſis rationibus* "*coram judicibus eccleſiaſticis et ſecularibus* "*ventilatur*." 2. Inſt. 622.

(*c*) See the Caſe of Uſury, 2. Inſt. 442.

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derſtood, that a man * ſhall not be twice puniſhed in the ſame manner as gives damages twice, or be twice fined upon an indictment. As if a man bring *treſpaſs* for *maihem*, and recover damages, he ſhall not after have *an appeal*; for the firſt recovery may be pleaded in bar to it; and the reaſon is, becauſe both tend to have damage (*a*). If *A.* ſteal the goods of *B.* and he bring treſpaſs for them, and is barred, yet he may bring his appeal of felony for thoſe goods. By the ſtatute of 7. *Jac.* 1. c. 4. every lewd woman that has a baſtard chargeable upon the pariſh, is to be put to the houſe of correction and puniſhed for a year, yet ſhe may notwithſtanding be puniſhed in the ſpiritual court: So if a man find another man in bed with his wife, he may have an aſſault and battery againſt him and recover damages; and he ſhall be likewiſe puniſhed in the ſpiritual court for adültery (*b*).

Eyres *contra*. One is not puniſhable in the ſpiritual court for a ſolicitation of chaſtity, where there is force uſed to gain that, though he be in caſe of a ſolicitation only; for the force gives ſuch a temporal mixture to the offence as ouſts them of juriſdiction (*c*). A matter merely ſpiritual is where there is no mixture of the temporalty (*d*). Fornication, when by conſent of parties, is within their conuſance, and ſo is ſolicitation; but if one will go farther and uſe force, which, if perfected, would amount to *a rape*, and by conſequence felony, they have no pretence; for the ſolicitation and force being at the ſame time, make an entire offence puniſhable at the common law.

Now, as to have one crime puniſhed here and there, the laying of violent hands upon a clerk is within the expreſs words of the ſtatute of *Circumſpectè Agatis*, puniſhable there, after it is puniſhed here, but not before, *Fitzherbert* ſays (*e*), that if they proceed ſooner, a prohibition will lie. A ſuit was inſtituted in the ſpiritual court for theſe words, "You are a bawd, there were two couple "abed in your houſe (*f*); and a prohibition was granted upon a ſuggeſtion of an action depending for the ſame words at law.

Holt, *Chief Juſtice*. The prohibition ought to ſtand; for it was but one intire act, and they below cannot divide it: for the plaintiff in the prohibition has averred the fact for which they are indicted, and that for which the ſuit is below, to be the ſame; * [81] * and to give them juriſdiction below, you ſhould have come and rejoined, and traverſed its being the ſame fact; but that it was for other cauſe than is in the indictment, and that perhaps would have divided it. And he put this caſe, which he ſaid had been adjudged in my **Lord Hyde**'s time: The libel below was for ſaying the proſecutor had *a baſtard*; the defendant comes and ſuggeſts for a prohibition, that he accuſed the plaintiff below, before

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(*a*) 4. Co. 43.

(*b*) Sir Philip Coot *v.* Bertie. Duke of Norfolk *v.* Sir John Germaine.

(*c*) 2. Inſt. 488.

(*d*)

(*e*) Fitz. N. B. 430.

(*f*) Palm. 379.

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juſtice of peace, of getting *a baſtard-child*, and that the juſtice djudged him to be the *reputed father* of it; and that he ſpoke e words before the juſtice; and it was replied, that they were oke at large, and no otherwiſe than before the juſtice of peace; d to this it was pleaded by way of *eſtoppel*, that ſince he had been djudged before the juſtices to have been the father, he could not e below for defamation; and of that opinion was the Court. ere you ſhould ſay, that it was for another offence than the ſolicitation in the indictment; or that it was at another time and ace than is laid in the indictment; and their laying, in THE IBEL, another time and place than is in the indictment, is not nough; for below they lay at what time and place they pleaſe. f a man ſolicit a woman, and go gently to work with her at firſt, nd when he finds that will not do, he proceeds to force, it is all ne continued act, beginning with inſinuation and ending with orce. And in the caſe of the *Duke of Norfolk v. Germaine* (a), t was not pretended to be force; and an indictment will not lie or a plain adultery, but a libel below will; though the law indulges the huſband with an action of aſſault and battery for the injury done to him, though it be with conſent of his wife, becauſe the law will not allow her a conſent in ſuch caſe to the prejudice of her huſband, becauſe of the intereſt he has in her: And he compared it to the caſe of calling a woman "a whore and thief;" there ſhe ſhall not ſplit the words and puniſh him below for calling her "a whore," and at law for calling her "a thief." He agreed, that if adultery be committed with another man's wife, without ny force, but by her own conſent, though the huſband may have ſſault and battery, and lay it *vi et armis*, yet they ſhall in that caſe puniſh below for that very offence; for an indictment will not lie for ſuch an aſſault and battery, neither ſhall the huſband and wife join in the action at common law; and therefore they proceed below either civilly, that is, to divorce them; or criminally, becauſe they were not criminally proſecuted above; and the true ction for the huſband in ſuch caſe, is a ſpecial action, *quia* the defendant his wife *rapuit*; and not to lay it *per quod conſortium miſit* (b).

* [82]

3. Peer Wms. 269. 273. 276. Ld. Ray. 1031. 1208. Stra. 61. 977.

THE COURT *acc*: for that the offence is not merely ſpiritual.

(a) 1. State Trials, 27.

(b) See Raſtal's Entries "Treſpaſs."

The Queen *againſt* Cantuell, *alias* Sangway.

Caſe 110.

THE DEFENDANT was excommunicated below, *pro jactitatione maritagii*, and taken up upon a fifth proceſs of *excommunicato capiendo*, in which there was a proclamation with a penalty. And being brought up by *habeas corpus*, and the writ of *excommunicato capiendo* being returned, that is, the writ on which ſhe was taken;

If in *ex. com.* a *capias* with a penalty iſſue, where it ought to be a *capias* only, the Court will diſcharge the penalty but not abate the writ.—S. C. 1. Salk. 294. Ante, 56. Poſt. 117.

The Queen *againſt* Cantuell, alias Sangway.

Chesshyre took exception:

First, That this being none of the nine caſes ſpecified in the ſtatute 5. *Eliz.* c. 23. it ought to have been a ſimple *capias*, and not *a capias* with a penalty.

Per Curiam. All we can do is to diſcharge the penalty.

Secondly, That there was no addition, as the ſtatute requires.

Addition is not neceſſary in a writ of *ex. com.* except it be for one of the cauſes in 5. *Eliz.* c. 23.—1. Show. 16. Jones, 226. Cro. Car. 197. 198. 1. Vern. 24.

Per Curiam. This being not one of the nine caſes mentioned by the ſtatute, there needs no addition.

Want of addition in an *ex.com.* muſt be pleaded.

Theo. Dig. bk. 3. c. 2. 1. Com. Dig. "Abatement" (E. 32.). Stra. 265. 3. Mod. 42.

And if it had required *an addition*, they doubted at firſt, whether they could relieve her upon motion? but that it ought to be pleaded. But upon conſideration, they inclined to think that they might relieve her upon motion, the fault appearing on the record before them.

An excommunication is a criminal matter, and therefore a *feme-covert* may plead alone to it.

It was ſaid at the bar, that if a plea were neceſſary here, it would be a miſchievous caſe; for here ſhe was excommunicated at the ſuit of her huſband, and he would not join in the plea with her.

2. Roll. Abr. 556. Cro. Jac. 592. Cro. Car. 90. Stra. 61. 977. Fort. 377.

Holt, *Chief Juſtice*, anſwered, that a *feme-covert* may plead alone in a criminal matter, as this is; as if ſhe were attainted of felony, ſhe might plead a pardon: but he agreed, that when huſband or wife are taken upon a *capias utlagatum*, the wife ſhall be diſcharged.

The reaſon of *additions* being required by 5. *Eliz.* c. 23. to an *ex. com.*

And he ſaid, that the reaſon of the additions being requiſite by the ſtatute in the nine caſes, and none other, was in order to a proclamation and penalty, * but that to an impriſonment by virtue of an *excommunicato capiendo*, there was no occaſion for it.

Gould, *Juſtice.* Until the caſe of *Hughes v. Bender* (*a*), the law was held, that if one were taken upon a proceſs of outlawry with a penalty, he ſhould be diſcharged; but in that caſe, and ſince it has been held, that ſhe ought to be diſcharged of the penalty only (*b*).

The ſpiritual court need not require perſonal appearance in *ex. com.* but may take bond for it. F. N. B. 63.

And it was ſaid, that they were willing to abſolve her below, but that they muſt have her in perſon to give caution *de parendo mandatis eccleſiæ.*

The Court anſwered, that that need not be, for they might take a bond with a penalty reaſonable from other perſons, with condition that ſhe ſhould ſubmit herſelf; though it is true, the moſt uſual way is to take juratory caution.

(*a*) W. Jones, 226.

(*b*) Cro. Car. 196, 197.

And THE COURT declared they could not diſcharge her by law, and ſo ſhe was remanded.

THE QUEEN *againſt* CANTWELL.

HOLT, *Chief Juſtice*, here would not determine, whether the writ being with *proclamation* and *penalty*, when it ought not ſo to be, made the whole naught, or only *quoad* the proclamation and penalty.

Qu. If an *ex.com.* with *proclamation* and *penalty* is totally void.

Greenway *againſt* Freeman.

Caſe 111.

THE STATUTE 8. & 9. *Will.* 3. c. 18. of two thirds in number and value was pleaded in bar, and the defendant, to bring himſelf within the benefit of the ſtatute, ſhews, that he abſconded at the time mentioned by the ſtatute, but did not ſhew for what he abſconded; and for this the plaintiff had judgment on demurrer.

Bankrupts.
S. C. 2. Ld. Ray. 810.
Ante, 10. 16.
Poſt. 96.
Ld. Ray. 764.

The Queen *againſt* Twitty.

Caſe 112.

MANDAMUS to ſwear in churchwardens. It was returned, that they were not choſen.

And IT WAS HELD a good return; for if both were not choſen, the writ does not command him to ſwear one of them, ſo the return is an anſwer to the command of the writ.

"*Not choſen*" is a good return to a *mandamus* to ſwear churchwardens.
5. Mod. 11.
Fitzg. 195.
Ld. Ray. 1495. Salk. 434. Dougl. 79, 80.

It was alſo held by THE COURT, that if the writ of *mandamus* were to ſwear them that were choſen generally, they might return generally that they were *not choſen*; but the writ ſetting forth ſpecially that they were choſen *debito modo*, they may ſpecially return that they were not choſen *debito modo*; but ſuch a return to a general writ would be ill (*a*).

S. C. 2. Salk. 433.
S. C. Holt, 442.
Ante, 37.
Poſt. 118.
6. Mod. 89.
Comb. 105.
Ld. Ray. 138. 559. 1008. 1379. 1405. 8. Mod. 325. Stra. 145. 609. 686. 894. 1246.

*[84]

* Hall *againſt* Hill and Others.

Caſe 113.

THE DEFENDANTS were Judges of a *Court at Briſtol*, in which the plaintiff had obtained a verdict and damages for twenty-eight pounds.

The plaintiff, the ſame day, went to the town-clerk, and got his coſts taxed, he being the proper officer, and took out a *capias* againſt the principal, and, upon return thereof, a *ſcire facias* againſt the bail, who after the return of a ſecond *ſcire facias* ſurrendered

An attachment lies againſt the Judges of an inferior court for granting a *new trial* after judgment has been given, coſts taxed, and a year elapſed.—S. C. 1. Salk. 201. S. C. 2. Salk. 650. S. C. 3. Salk. 363. S. C. Holt, 184. 1. Salk. 148. 396. Ld. Ray. 468. 556. 766. 8. Mod. 95. 189. 208.

(*a*) See the caſe of Baſſett *v.* Chicheſter, 1. Sid. 286. that if the Court do not ſee cauſe of reſtitution, though there be no good return to the writ, they will not grant a peremptory *mandamus*.—NOTE *to former edition*.

the principal; after which, and a year's time elapſed from the verdict and taxing of coſts, the Court granted *a new trial*; which being complained of to the Court in *Trinity Term*, a rule was made for AN ATTACHMENT, *niſi*.

And now THE ATTORNEY-GENERAL came to ſhew cauſe, and alledged, that the Judges below were in no fault, for there never was any judgment entered below; and until judgment entered, the hands of the Court are not tied from granting a *new trial* at any time before judgment, if they ſee cauſe; and if they miſtake that for a cauſe which is none, that only is an error of their judgment, for which they are not puniſhable (*a*); and though here *a new trial* was granted after a *writ of error* allowed, that will not alter the caſe; for it is frequent to have a writ of error allowed before judgment; and the proceeding againſt the bail was groundleſs, there being no judgment entered, and ſuch proceedings did not hinder the Court's being at large to grant *a new trial*. And he quoted the caſe of *Tiny v. Roberts (b)*, where, the plaintiff having omitted entering judgment as ſoon as he might have done it, the Court granted a new trial. And he ſaid, here the Court were not bound to enter judgment without prayer of plaintiff, though an inferior court (*c*).

BRODERICK and THE SOLICITOR-GENERAL anſwered, that the coſts were taxed here by the proper officer, and that he thereupon had made out a proceſs againſt the defendant; and that is warrant enough for execution, though there be not a final entry *[85] of the judgment upon THE * ROLL, which is never done in thoſe courts until writ of error brought: where they are forced to make up the records, indeed, they ſometimes enter in the margin, "judgment for the plaintiff."

HOLT, *Chief Juſtice*. The writ of error ought not to be allowed until judgment given, and it is a good return to it, that judgment is not yet given.

THE ATTORNEY-GENERAL confeſſed this as to the point of the return, but affirmed that they frequently do allow them before judgment.

HOLT, *Chief Juſtice*, likewiſe agreed, that a Judge is not puniſhable for an error in judgment; but he ſaid, it is rare for the ſame Judges to grant *a new trial* before themſelves, as here, after a TRIAL AT BAR; though that he ſaid had been done, though never with his conſent; but it is uſual to grant a new trial after a trial at *niſi prius*, but that is ever after freſh purſuit, that is, the

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(*a*) See Rex *v.* Young, 1. Burr. 556. Rex *v.* Cox, 1. Burr. 785. Rex *v.* Palmer, 2. Burr. 1162. Rex *v.* Jackſon, 1. Term Rep. 653.

(*b*)

(*c*) 2. Vent. 189.

Hall *againſt* **Hill and Others.**

very next Term *(a)*; but here it was granted after a year, coſts taxed, and as much entry of a judgment as is in any caſe there, and execution taken out; and it is no excuſe for them to ſay, they are not lawyers, for they ought to take advice of lawyers; and if they are ſo preſumptuous as to take upon themſelves the knowledge of the law, it ought not to be ſuffered, though there be no corruption in them. And he remembered the caſe of the *Steward of Windſor Court* (*b*), who acted both as Counſel and Judge, after bail to the writ of error brought upon his own judgment; but upon complaint the judgment was ſet aſide, and reſtitution awarded. But he ſaid, they would not grant *an attachment* for an error in judgment, where it is a matter within their judgment; but where it is not a matter within their judgment, as here it was not, they having already given their judgment, Why ſhould not we grant it?

And here the rule was, that the rule for *a new trial* be ſet aſide, and the rule for *an attachment* diſcharged upon payment of expences of the complainant, and judgment entered below as of the due time,

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(*a*) It is ſaid S. C. 2. Salk. 650. the Court held, that a *new trial* cannot be granted by an inferior court. S. P. Brook *v.* Ewers, 1. Stra. 113. S. P. Bailey *v.* Boorne, 1. Stra. 992. But it is determined that the Judge of an inferior court may ſet aſide a verdict for irregularity or ſurprize, Jewel *v.* Hill, 1. Stra. 498. or an interlocutory judgment, though not irregular, in order to let the party into a trial of the merits, Cavil *v.* Burnaford, 1. Burr. 571. but it ſeems agreed that he cannot grant a new trial upon *the merits*. Blacquiere *v.* Hawkins, Dougl. 379. Rex *v.* Day, Sayer's Rep. 202. Rex *v.* Urling, Fort. 198.

(*b*) Ante, 1.

Anonymous.

Caſe 114.

Affidavits may be read in corroboration.

Tidd's Pract. 262.

1. Term Rep. 717.

NOTE, Here it was agreed to be the courſe of the Court, that where, upon an affidavit made, a day is given to hear Counſel on both ſides, the party may read as many affidavits as he pleaſe in corroboration of the firſt, and concerning the ſame matter, but muſt read none concerning new matter (*a*).

1. Wilſ. 335. Stra. 1157. Dougl. 467.

(*a*) See Rex *v.* Sharpneſs, 1. Term Rep. 228.

Anonymous.

Caſe 115.

Bail render the principal.

6. Mod. 132.

IT WAS AGREED, that the principal cannot be rendered by bail after plea pleaded *(a)*.

231. 238. Comb. 4. Poſt. 90. 98. Ante, 51. 77. 2. Show. 79. 147.

(*a*) See Tidd's Pract. 144, 145.

Caſe 116.

* The Queen *againſt* Parker.

Six days allowed to plead to an indictment.

INDICTMENT: To which the defendant demurred; and upon motion, the queen had *ſix days* to plead peremptorily, or join in demurrer; and within the ſix days their clerk in court died.

And now, after three Terms, they applied to the Court, which told them, if they had come in any reaſonable time they would relieve them.

Non Proſ. on indictment muſt be by motion.

2. Salk. 456.

And here, PER CURIAM, *Non proſ.* ought not to be entered upon an indictment but upon motion in court, and leave thereby obtained.

Caſe 117.

Eaſt *againſt* Effington.

A declaration on a bill of exchange drawn, "*Pay this my* "*firſt bill, the* "*ſecond and third* "*not being paid,* "*&c.*;" and ſtating that the drawee "*indorſavit ſuper billam illam contenta billæ illius fore ſolvenda*" to the indorſee, is good after verdict, although it do not ſtate that the ſecond and third bills were not paid.

AN ACTION by the indorſee of a bill of exchange againſt the drawer, declaring upon the cuſtom of merchants, and that *A.* to whom the bill was made, *indorſavit ſuper billam præd. content. billæ præd.* to him the plaintiff *ſolvend.*

And here it was agreed by THE COURT; that "indorſement" is a term known in law, and ſignifies a writing on the back of a paper or parchment containing another writing.

To this declaration two exceptions were taken in arreſt of judgment:

FIRST, That the words of the indorſement were not ſignificative enough to paſs the property of the bill to the plaintiff, according to the cuſtom of merchants.

THE SECOND EXCEPTION was, That it appears there were three bills for the ſame ſum, and that whereon the action is brought was the firſt, and ſays, "my ſecond or third not paid, "pay this my firſt."

S. C. 1. Salk. 130. S. C. 2. Ld. Ray. 810 Poſt. 155. Comb. 4. 9 32. 152. 227. 252. 6. Mod. 29. 36. 80. Ld. Ray. 175 181. 231. 360. 442. 744. 757. 774. 8. Mod. 43. 265. 307 362. 373. Comy. 57. 75. 311. Stra. 829. 648. 478. 557. 1031. 1211. 5. Com. Dig. "Pleader" (C. 60.).

But PER CURIAM, However that matter would have been on *demurrer*, it will be well *after verdict*; for if the ſecond or third were paid, there had been no promiſe at all, for the promiſe is conditional to pay this, if the ſecond or third be not paid; therefore if the ſecond or third were paid, the jury could not find for the plaintiff (*a*).

And as to the firſt exception THEY HELD, that that would be likewiſe good after verdict; for without finding an indorſement,

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(*a*) See Slarke *v.* Cheeſeman, Carth. 509. and Weggerſtoffe *v.* Keene, Stra. 223. where it is held, that this allegation is unneceſſary after judgment by default, or on demurrer to the replication. See alſo Hotham *v.* Eaſt India Company, 1. Term. Rep. 640. Collins *v.* Gibbs, 2. Burr. 899.

they could not find for the plaintiff (*a*). And it is not true to ſay, that at this rate, and for this reaſon, it may be ſaid, if there were no manner of indorſement, that defect would be cured by verdict; for here there is a kind of an indorſement ſet forth, and the jury could not find for the plaintiff without finding this to be a good indorſement, and ſuch as amounts * to an agreement to have the money paid to the plaintiff. A bill of exchange may be accepted by *parol*, but not transferred otherwiſe than by writing upon the back of it; and that transfers the property, by the cuſtom of merchants. And they put the caſe of debt for rent, by the grantee of reverſion, without ſhewing attornment, and helped by verdict; and ſo in caſe of bargain and ſale, pleaded without inrolment, good after verdict.

*[87]

Holt, *Chief Juſtice.* If a man write on the back of a bill of exchange, "*This is to be paid to* J. S." or, "*The contents of this bill to be paid to* J. S." and ſet his hand to it, it will be a good indorſement.

Quære pro me, Why not a declaration of truſt? But if there be no indorſement at all ſet forth, the verdict cannot help.

And judgment was given for the plaintiff.

(*a*) See Pinkney *v.* Hall, 1. Ld. Ray. 175.

Grips *againſt* Ingledew.

Caſe 118.

Hilary Term, 13. *Will.* 3. *Roll* 438.

On a declaration in debt on bond, by which the plaintiff agreed to ſell the defendant ſo many ſtacks of wood at 35l. a ſtack, under a penalty of 100l. ſtating that he had ſold him 800 ſtacks and ſome odd ſtacks more, &c. the plaintiff can only recover for the 800 ſtacks, and muſt enter a *remittit* for the reſidue.

S. C. Holt, 200. S. C. 2. Salk. 658.

DEBT UPON A DEED OF ARTICLES, whereby the defendant had agreed to pay the plaintiff thirty-five pounds for every hundred ſtacks of wood lying in ſuch a wood; and ſo for as many more as ſhould be felled until *Michaelmas* following. And the plaintiff declared for ſo much money as eight hundred ſtacks would give at that rate; and alſo for as much as ſome odd ſtacks more would give, in proportion to the rate of thirty-five pounds for the hundred.

To this declaration there was *a demurrer*, becauſe he declared for more than the articles entitled him to; there being no agreement for anything under a hundred ſtacks; ſo he demanded more than his due, upon his own ſhewing.

Atcherly *for the plaintiff* took this difference: Where a man is not to recover upon his deed or evidence, but upon a matter of fact ariſing out of it, and inquirable by the jury, which is to be the meaſure of damages, then one need not expreſsly keep up to the very tenor of his deed; but he may enter a *non proſ.* for what he demands too much, and have judgment for what is juſtly demanded.

S. C. 2. Ld. Ray. 814. Poſt. 143. 148. 1. Saund. 206. 282. Hob. 178. 2. Salk. 658. Yelv. 66. 1. Sid. 417. 5. Mod. 213. Ld. Ray. 152. 536. 697. 715. 735. Burr. 2228.

CRIPS *against* INGLEDEW.

And he ſaid, that upon this rule there had been declarations for leſs and more than was due, and the plaintiff had judgment. In the caſe of *Pemberton v. Shelton* (*a*), an action of debt was brought upon the ſtatute of 2. *Edw.* 6. c. 13. for not ſetting forth tithes; and the declaration demanded thirty-three pounds as treble damage, the ſingle value being eleven pounds and eightpence, as he had averred; and it was moved in arreſt of judgment, that three times eleven pounds and eightpence did not make thirty-three pounds, but thirty-three pounds two ſhillings; ſo he declared for leſs than
* [88] his demand; and that he ought not to do, without ſhewing * how the reſt was paid: but the Court held it well upon this difference, that where the ſum is certain upon the very bond or contract, without any matter *dehors* to help it, there one ought not to vary from his bond or writing without ſhewing how the reſt came to be ſatisfied; but when the certainty of the demand cannot appear, but from matter of fact *dehors* of the deed or contract, which the deed or contract refers to, there, if you demand more or leſs than is due, it ſhall not vitiate. He quoted the caſe of *Salmon v. Smith* (*b*), the caſe of *Thwaite v. Aſhfield* (*c*), the caſe of *Barber v. Pomeroy* (*d*); and he produced THE ROLL (*e*) of the caſe of *Barber v. Pomeroy* into court; and the judgment appeared to be entered for the plaintiff; and he quoted the *Book of Pleas* (*f*), and the caſe of *Andrews v. Delahay* (*g*), which was debt for one hundred pounds on three ſeveral bonds; and it appeared on the declaration, that one of the bonds was not due; and a verdict was given for the plaintiff, and entire damages and coſts aſſeſſed; and the Court held, that although he could not have judgment in form as it is found, yet that upon the releaſing damages and coſts, judgment was given for the two bonds that were due.

Poſt. 154. ON THE OTHER SIDE, a difference was taken between an entire demand and ſeveral demands joined in one; for in the latter, if the plaintiff fail in one of them, and is right in the other, he may have judgment for what is well, releaſing what is ill (*h*). But where the demand is entire, and the plaintiff, in making it out, ſhews he has right but to part of it, there the judgment muſt be againſt him in the whole, becauſe he is wrong in his demand (*i*). There are ſome Books which make a difference where an action is grounded upon *a wrong*, and where upon *a contract*; but the true reaſon of that difference, as was ſaid, is, becauſe contracts generally are entire; for let it be for wrong or on contract, it is the ſame upon the difference of the entire and divided demand; and for this the
* [89] caſe of *Andrews v. Delahay* (*k*) was relied on, for they are * ſeve-

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(*a*) Cro. Jac. 498.

(*b*) 1. Saund. 206.

(*c*) Hilary Term, 7. *Will.* 3. Roll 469. reported Comb 365. S. C. 12. Mod. 93. S. C. 5. Mod. 212.

(*d*) Stiles, 175. S. C. 1. Roll. Abr. 785.

(*e*) It is entered as of Hilary Term, 24. *Car.* 1. Roll 951.

(*f*) Placita Latina Rediviva, page 412.

(*g*) Hob. 178. S. C. 1. Brownl. 68.

(*h*) 11. Mod. 196.

(*i*) Cro. Jac. 538.

(*k*) Hob. 178.

CRIPPS *against* INGLEDEW.

ral cauſes put in one action. If an action be brought upon a ſingle bill, payable at ſeveral days, and one of the days is not yet come, the plaintiff ſhall not have judgment for that part that is due; but according to the notion on the other ſide he ſhould; and the reaſon why it cannot be done is, becauſe it is an entire demand; and it was ſaid, that the difference taken in *Godfrey's Caſe* (*a*) would not affect this caſe; that is, a man brings an action for two things, and of his own ſhewing it appears, that he cannot have an action for one of them, or a better writ, there the writ ſhall be well for that part for which it is good: and the caſe of *Pemberton v. Shelton* (*b*) is not like this, for there the defendant ſevered it by his plea; for the jury might apportion it, or the defendant could do it by his plea, but he himſelf cannot do it, by ſhewing he has no right to part of what he demands; and the judgment here will not be final; but he may have a new action for what is due. The reaſon of this will hold in a real action; for if *an aſſiſe* be brought of a manor, the defendant cannot abridge this by claiming leſs or ſhewing title to leſs than a manor; for he muſt recover the whole manor or nothing (*c*); but if it be for ſo many acres, there he may abridge and recover part, becauſe then the demand is ſeveral of ſeveral acres; but where he demands an entire thing, he cannot abridge his demand; but if he join ſeveral cauſes of action in one, there, though he fail in making title to part, he ſhall recover the reſt; and in the caſe of *Barber v. Pomeroy* (*d*), GERMIN, *Juſtice*, was ſtrongly againſt ROLL, *Chief Juſtice*.

1. Roll. Rep. 77.
Hob. 133. 164. 178.
5. Mod. 213.

HOLT, *Chief Juſtice*. This is no entire demand any more than every action of debt is, let it conſiſt of ever ſo many differing particulars, as the caſe of the three bonds before put. Suppoſe each bond were for twenty pounds, the *præcipe* is of ſixty pounds, and that is all one *præcipe*; and yet when he comes to declare, he declares upon three bonds, each of twenty pounds, that makes up the ſum in the *præcipe*; notwithſtanding, if it appear that one of the bonds is not yet due, then the Court, *ex officio*, ſhall abate the ſuit as to that bond, and give judgment for the reſt; ſo in this action the demand is entire, but it is not ſo in the original foundation of it, for that is ſeveral; and this is the difference, if there be a certain ſtated ſum ſpecified in the deed itſelf, that ſhall not be abridged by any *remittitur* or releaſe of the plaintiff, if he declare upon that deed; as if a man bring an action of debt upon a bond of thirty pounds, and declare upon a bond of twenty pounds, this will be bad, * becauſe he has brought his action for more than is due; and this reſts upon the deed only, and the ſum in it does not amount to his demand; but if an action be brought upon a deed which refers to a matter of fact that makes the duty more or leſs, if the fact which is referred to will entitle him to a leſs ſum only, and he demands more than the fact which the

* [90]

(*a*) 11. Co. 45.

(*b*) Cro. Jac. 498.

(*c*) 1. Viner Abr. 199.

(*d*) Stiles, 175. S.C. 1. Roll. Abr. 785.

deed

GRANT *againſt* INGLEDEW.

deed refers to upon computation will entitle him to, there let him remit ſo much of his demand as the fact does not make out, and it will be well, and he ſhall have judgment for the reſt; for that fact which is not made out is not contradicted by the deed. And he ſaid, that the caſe of *Barber v. Pomeroy* was an authority in point: It was debt for rent, and upon computation it appeared, that he demanded more than by the matter of fact out of the deed appeared to be due to him, and there he releaſed what was demanded too much, and took judgment for the reſt. And no diverſity between *a demurrer* and *a verdict*, for that caſe was upon a verdict, and this upon demurrer. And he ſaid, the caſe of *Thwaite v. Aſhfield* (*a*), before quoted, had been adjudged upon the authority of the caſe of *Barber v. Pomeroy*. 2. Roll. Abr. 785. Stiles, 175. Comb. 365.

POWELL, *Juſtice*, *acc.* The plaintiff muſt make his demand entire, though he make his title of ſeveral particulars, as ſome by one bond, ſome another; yet being in the nature of ſeveral demands, and made up of ſeveral particulars, he may recover on the one and not on the other; and the caſe of *Barber v. Pomeroy* is exactly this caſe in its reaſon. He ſaid, this was not a demand of one entire ſum mentioned in the ſpecialty, but of that which might be more or leſs by matter of fact out of it; as an indenture of leaſe refers to days of payment, and one demands more rent than there were days of payment paſt; ſo here he demanded more money than there were hundreds of ſtacks; and the one caſe being on *verdict* and the other upon *demurrer* makes no difference. *Godfrey's Caſe* (*b*) was upon demurrer, and the queſtion there was, Whether the writ ſhould abate for part and fail for part, or fail in all? And the ſame queſtion is of the count here.

POWIS, *Juſtice*, was of the ſame opinion. And he quoted the caſe of *Howell v. Samback* (*c*); and as to the objection which was made, that thus the defendant might be enſnared into a demurrer, when he might have a good plea to bar the plaintiff, he ſaid, that if he had ſuch a plea he ought to plead it.

*[91] * GOULD, *Juſtice*, conceived a difference between *a demurrer* and *a verdict* in this caſe; and ſaid, that if *an aſſiſe* were for four pounds rent, one could not abridge that demand; and ſo he ſaid it was in real and perſonal actions. If an action of debt be brought for rent, part ſeck and part charge, the writ abates in all (*d*).

HOLT, *Chief Juſtice*. As to the caſe of aſſiſe for *four pounds*, and ſhewing only *diſſeiſin* of *three pounds*, that is quite another thing; for then he brings *an aſſiſe* of a rent, of which he was not at all diſſeiſed. And he ſaid, this was a debt indeed ariſing by deed, but not a ſtated debt in the deed itſelf. And he ſaid, the caſe was

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(*a*) 5. Mod. 212.

(*b*) 11. Co. 45.

(*c*) Hob. 133.

(*d*) Year-Book 10. *Hen.* 6. pl. 5. Dyer, 61. b. Yelv. 66.—But ſee now 4. *Geo.* 2. c. 28.

no more than a man's avowing for a quarter's rent more than is due, and a demurrer thereupon. He ſhould have a return irreplevisable for what is due. So of rent, and *nomine pœnæ*, and title only for rent.

And by THREE JUDGES, judgment was given for the plaintiff, he releaſing the overplus.

NOTE, Here it was agreed by the Court, that ſo much a hundred, and ſo much a hundred by retail, are the ſame thing, and that here either party may tell them out; and that if he that had told them had not told them right, then the other might ſhew that, and join iſſue upon it. And it was agreed here, that the property of every hundred that was cut at the time of the agreement did veſt in the plaintiff; and ſo of the reſt, as they were cut down. If the ſale had been of five hundred ſtacks out of ſeven hundred, then the buyer might chuſe; but if it were five hundred to be ſet out by ſeller, the ſetting-out would be a condition precedent.

Yoxon *againſt* Bennet.

Caſe 119.

Judgment in an inferior court is good, although the *ſummons* was directed to the *ſerjeant at mace*, and the proceſs to bring in the jury to the *ſheriff of the county*.

Ante, 23.

2. Salk. 417. 435.
6. Mod. 124.
2. Lev. 200.
2. Mod. 35.
3. Mod. 139.
8. Mod. 328.
Ld. Ray. 592. 777. 1182. 1369.
1. Bac Abr. 236.
2. Bac. Abr. 117.
3. Term Rep. 183.

ERROR OF A JUDGMENT affirmed in the *court of Cheſter*, upon a writ of error of a judgment given in the corporation-court of the city, in an action upon the caſe for a libel.

The declaration ſet forth, that the plaintiff was AN ALDERMAN of the city of *Cheſter*, a juſtice of peace, and a grocer by his trade; and that the defendant did maliciouſly, &c. publiſh a libel of him in theſe words, which he cauſed to be fixed up in ſeveral places of the town: "Theſe are to adviſe all good perſons to ſhew me "where I may ſee *Alderman Yoxon*, to receive my money of "him."

A demurrer to this declaration, and judgment for the plaintiff in *the mayor's court*, affirmed in *the Chief Juſtice's court*.

And here it was aſſigned for error, that upon *the plaint* levied below, the proceſs to bring the defendant into court was directed to, and executed by, "THE SERJEANT AT MACE;" and after an interlocutory judgment in the demurrer, they directed a precept to "the ſheriff of the county" to call a jury, and enquire of damages.

And IT WAS URGED, that they could not change that officer; but that the ſame officer who executed the *meſne proceſs* ſhould execute the *judicial* one; and they ſaid, no preſcription could be to juſtify theſe proceedings, becauſe they had no ſheriff until the time of *Henry the Seventh*; for until the twenty-firſt year of that king, the city was part of the county at large, and they had no ſheriff but that of the county; and therefore this ſheriff could not be an officer to *the mayor's court*, which is by preſcription.

A SECOND

Yoxon *againſt* Bennet.

* A SECOND ERROR was, that upon an interlocutory judgment in an inferior court the way to enquire for damages is, for the SERJEANTS AT MACE to ſummons an inqueſt to appear in court, and to make enquiry in court; for it never was ſuffered in an inferior court, that the Judge of it ſhould ſend his precept to another officer to enquire of damages; for that is the particular prerogative of the courts of WESTMINSTER-HALL to ſend to the ſheriff to enquire of damages; and is more than even the courts of *London* have ever attempted to do.

A THIRD ERROR was, that *the original* was AN ATTACHMENT *per corpus*, which is only a proceſs in treſpaſs *vi et armis*, and not in caſe; for in treſpaſs on the caſe, the original proceſs is AN ATTACHMENT *per bona*, but not to arreſt a man's body preſently.

A FOURTH ERROR was, that the joinder in demurrer is *petit judicium pro damnis occaſione tranſgreſſionis præd.* inſtead of *occaſione tranſgr. ſuper caſum.*

CHESSHYRE *contra*. It is ſaid before to be, *tranſgr. ſuper caſum*, and then *tranſgr. prædict.* muſt be *ſuper caſum.*

As to THE FIRST EXCEPTION he ſaid, the *city of Cheſter* was an ancient county long before *Henry the Seventh*'s time; and it had ſheriffs time out of mind, and proceſs directed to them, and abundance of ſuch precedents; and the act of 11. *Hen.* 7. c. 15. was only a confirmation. And he ſaid, all their precedents were thus, that THE SERJEANT AT MACE did execute the *meſne proceſs*, and the ſheriffs proceſs after judgment; and that ſuch a thing might be good by grant; and what may be by grant might have been by preſcription; and he ſaid, that, by law, the ſame perſon may be judge and miniſter (*a*). By the ſame reaſon, ſeveral may diſcharge the office of one (*b*). The courſe of a court is the law thereof, and need not be ſhewed ſpecially in pleading; Poſt. 95. but the courts above are to be ſatisfied of it by precedents and certificates of the Judge of the court (*c*). And there is a difference in the manner of taking bail in this court and the common pleas; and ſo formerly of return of *ſcire facias*; this court did always require two *ſcire facias*, and returns to them both, but one ſufficed in the court of common pleas.

*[93] * HOLT, *Chief Juſtice*. Suppoſe the firſt proceſs to THE SERJEANT AT MACE were wrong, yet appearance and pleading will cure it; for where a man has a day on THE ROLL, he may appear if he will at that day, though there be no return of the writ; and precedents are ſhewn as ancient as 5. *Eliz.* of this manner of proceeding.

POWELL, *Juſtice*, ſaid, they could not take judicial knowledge whether the city of *Cheſter* had a ſheriff only by act of parliament in time

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(*a*) 1. Cro. 138. Jones, 193. Year-Book 12. *Hen.* 7. pl. 3.

(*b*) Mod. 598. Noy, 64.

(*c*) Wincot's Caſe, 2. Co.

time of *Henry the Seventh*; for that ſtatute only ſays, then it was made a county; and the ſtatute of 43. *Eliz.* c. 15. ordains, that the officer of an inferior court ſhall not ſwear a jury to enquire of damages before him; but the method is for them to ſummon a jury to enquire of damages, and to ſwear them in court before the ſteward or Judge of the court: and precedents were ſhewn here of writs anciently directed to the ſheriff of *Cheſter*, and that there is a court by preſcription holden there, called *the ſheriff's court*.

And by **Powell**, *Juſtice*, An officer called "*ſheriff*" might have been without a county, and ſo known time out of mind; and a ſubſequent act of parliament making it a county alters not the preſcription: but he ſaid, this could not be made good but by preſcription; for the ſame officer that executes one proceſs ought to execute all; and therefore if, upon exception to *the ſheriff*, proceſs be directed to *the coroner*, though the exception be afterwards removed, it ſhall never after go to the ſheriff; and though there be no precedents of theſe proceedings but ſince the time of *Henry the Seventh*, yet if the current of precedents has been ſo ever ſince, we ought rather to run with the tide than to reverſe all the judgments that have been given ſince; for in ſome caſes, *Communis error facit jus.*

And, **per totam Curiam**, judgment was affirmed, without regard to the inqueſts being taken before the ſheriff.

Oades *againſt* Woodward.

Caſe 120.

If either party die in Vacation, within a year after giving a warrant of attorney, judgment may be entered up of courſe at any time after in that Vacation.

S. C. ante, 2.

UPON **a report** by **Mr. Clarke**, *the Secondary*, the caſe was thus: One had given a warrant of attorney to enter judgment againſt him as of *Michaelmas Term*, or any other ſubſequent Term, and before judgment entered he died; and after the attorney entered up judgment as of a Term when the party was alive.

The debate was upon the * regularity of the entry, for that the attorney's warrant was determined by the party's death (*a*).

S.C. 1. Salk. 87. S.C. 3. Salk. 116. S. C. Holt, 401. S. C. 2. Ld. Ray. 766. 849. Ante, 39. Fitzg. 191. Stra. 718. 882. 1081. 1121. Com. Rep 117. Tidd's Pract. 259. 694. 706.

Holt, *Chief Juſtice*, declared himſelf deſirous to know how the late practice had gone, for he had known various reports of it formerly; at one time it had been reported, that if the plaintiff had entered judgment before the continuance-day after the defendant's death, it would hold good, but not after; at other times it had been reported, that he might enter it at any time before the eſſoin-day of the next Term as of the precedent Term when the party was alive; ſo, he ſaid, it had gone both ways.

The Attorney-General ſaid, If the party do not enter his judgment within the year and day, he cannot do it afterwards

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(*a*) See 2. Stra. 718. 1081. Barnes, 270. Viner's Abr. "Judgment" 107.

OADES *againſt* WOODWARD.

without the leave of the Court (*a*), which cannot be had without an affidavit that the parties are living; and, Why is that required, if within the year it may be entered after death of the party?

HOLT, *Chief Juſtice.* The reaſon is, that if he enter it after the year, he muſt enter it as of that Term on which he has leave; but within the year he may enter of a precedent Term.

And *Shelley's Caſe* (*b*) was quoted at THE BAR, where judgment was given after the party was actually dead, becauſe he was alive in the morning the firſt day of Term.

Ante, 39. 68. Ld. Ray. 695. 766. 849.

HOLT, *Chief Juſtice.* If one die in the Vacation after *poſtea* ſettled, judgment is frequently entered afterwards; ſo if the rule be for entering of judgment in Term-time, and the defendant die before it is entered, it ſhall be entered after; ſo if the defendant die after verdict againſt him, after *day in bank*, judgment ſhall be entered againſt him.

Ante, 39.

IT WAS OBJECTED to be a very inequitable thing; for by this means, one creditor would run away with all and leave the reſt nothing; and this was ſaid to be againſt both conſcience and law, for it was a rule in law, whenever a thing is doubtful at law to go by equity; that this was a kind of a fraud; that a letter of attorney was in its own nature revocable; that death was an actual revocation; and therefore the attorney had no authority to confeſs the judgment; and that the ſtatute of 29. *Car.* 2. c. 3. of Frauds and Perjuries, had made a difference in the caſe; for before that ſtatute, a judgment referred to the firſt day of the Term of which it was entered, but ſince that ſtatute, it refers only to the time of the actual ſigning of it, which time is to be marked on the ſide of THE ROLL: but that cannot be done in this caſe, * [95] * becauſe the attorney has no authority at the time the judgment was actually entered, though he had one at the time it is ſaid to be entered; and a warrant of attorney is revocable, though the party covenant not to revoke it.

Ante, 2.

ON THE OTHER SIDE, *Shelley's Caſe* (*b*), and *Sir George Reynel's Caſe* (*c*), in *Palmer*, were ſtrongly inſiſted on.

Warrant of attorney revoked. 8. Mod. 77.

Ante, 92.

HOLT, *Chief Juſtice.* If this be fraud, it is a *pia fraus* to get a juſt debt by due courſe of law; and he agreed, that a warrant of attorney was revocable in its nature; but if there be a warrant of attorney to confeſs a judgment, and after the defendant come and revoke it before it is entered, yet the attorney ſhall enter it notwithſtanding the revocation; and the courſe of the Court has been ſo time out of mind; and the courſe of a Court is the law of it. If judgment be entered in Vacation, and a writ taken out againſt the party's goods as of the Term before, yet the writ ſhall levy the money of his goods in the hands of his executors. If a fine be

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(*a*) See 6. Mod 212. 1. Wilſ. 36. and Tidd's Pract. 902.

(*b*) 2. Roll. Abr. 396. 1. Co. 93. Moor, 136.

(*c*) Palm. 508.

acknowledged

Gunet *againſt* Woodward.

acknowledged before commiſſioners in the long Vacation, and no writ of covenant taken out, then the party dies immediately, they ſhall after enter the *king's ſilver*, and take out *a writ of covenant* as of the Term before, and nobody ever ſtopped upon it; nor was it ever moved in the common pleas, "Do not receive this fine, for the party died before the *writ of covenant* ſued out." And the ſtatute of Frauds and Perjuries does not extend to this caſe; for if judgment be given againſt him, and execution taken out in the teſtator's life-time, it binds the goods in the hands of the executors (*a*); and the ſtatute of Frauds and Perjuries is purely for the ſake of *purchaſers*, and in regard to lands, but makes no alteration as to goods, but binds them only from the delivery of a writ to the ſheriff.

Another exception was, that upon ſearch it was found that no bail had been filed.

Bail filed after. 8. Mod. 31. 340.

But Holt, *Chief Juſtice*, inclined to compel the attorney to file bail now; for if it were an adverſary action they would do ſo, and why not ſo here? And he ſaid, he was very well ſatisfied as to the other point.

But upon the laſt exception, it was ſuffered to go over till next Term (*b*).

(*a*) 2. Ld. Ray. 850. Tidd's Pract. 728.

(*b*) It is ſaid S. C. 2. Ld. Ray. 850. that it appeared upon enquiry, that the roll, upon which the judgment was entered, was not brought into the office until after the eſſoin-day of the ſubſequent Term, and for that reaſon the Court refuſed to permit the roll to be filed, ſince purchaſers or others might be prejudiced by it. But by S. C. 1. Salk. 87. it appears, that one of the reaſons for refuſing to permit the roll to be filed was, becauſe the judgment was not *docketed* purſuant to the 29. *Car.* 2. c. 3. See alſo S. C. 3. Salk. 116.

* Anonymous. Caſe 121.

Scire facias returned. Ante, 40. Poſt. 138. Ld. Ray. 1177. 1467.

HOLT, *Chief Juſtice*. There cannot be two *ſcire facias* taken out together, but the firſt muſt at leaſt be ſeven or eight days out before the return of it, and then the ſecond to be purchaſed (*a*).

(*a*) Vide ante, page 5.

Nicholls *againſt* Tirrett. Caſe 122.

Bankrupts. Two-thirds ſtatute private. S. C. 2. Ld. Ray. 811. Ante, 10. 16. 83.

WHEN one pleads the ſtatute 8. & 9. *Will.* 3. c. 18. of Two-Thirds, if he would take advantage of the clauſe of being in cuſtody, he muſt ſhew it to have been on the ſeventeenth of *November*; if of the clauſe of abſconding, he muſt ſhew he abſconded for debt at the time of the ſtatute made.

And Holt, *Chief Juſtice*, ſaid, he took the ſtatute to be a private law; for though it concerned a great many, yet it concerned a particular ſort of people.

[illegible] *againſt* Tirrett.

And here the plaintiff had judgment, becauſe the defendant did not ſhew in his plea, that he had abſconded at the time of the act made, but only ſaid it was on the ſeventeenth of *November*.

Caſe 123.

Thomkins *againſt* Pincent.

Upon a leaſe for years from 24 *June*, rendering rent at *Michaelmas*, *St. Thomas*, *Lady-day*, and *Midſummer*, or within twenty days after; a demand of a year's rent as due on 25 *December*, is bad.

DEBT FOR RENT. The plaintiff declared on a demiſe, bearing date the twenty-fifth day of *Auguſt*, in the eleventh year of *William the Third*, for ſeven years, from the twenty-fourth day of *June* before, paying quarterly at the moſt uſual Feaſts following the ſum of three pounds and ten ſhillings, VIZ. *Michaelmas*, *St. Thomas*, *Lady-Day*, and *St. John Baptiſt*, the firſt payment to begin at the Feaſt of *St. Michael*, and ſo from thenceforth every year quarterly, at the moſt uſual Feaſts during the ſaid Term, or within twenty days after the ſaid Feaſts.

S. C. 1. Salk. 141.
S. C. 2. Ld. Ray. 819.
Ld. Ray. 152. 697. 715. 735.

IT WAS OBJECTED, that the rent is payable at *Michaelmas*, *St. Thomas*, *Lady-Day*, and *St. John Baptiſt*, and this action is brought "for *fourteen pounds* of the ſaid rent for one whole year, ending "on the twenty-fifth of *December*, and payable then within twenty "days, *viz.* the tenth of *January*;" ſo that the twenty days were reckoned from the right day on which the rent was due, *viz.* the twenty-firſt day of *December*, *St. Thomas's Day*.

PER CURIAM. This exception, *viz.* that the rent was payable on the twenty-firſt of *December*, and then the year ended as to the rent; and then the rent had been payable and demandable if there had not been twenty days more; the declaration is bad, for it was for other rent than was * demandable and payable by the leaſe. And the caſe of *Parker v. Harris* was quoted (*a*): A rent was reſerved half-yearly from *Michaelmas*; an action brought for half-a-year's rent ending the twenty-fifth day of *March*, which was not half-a-year from *Michaelmas*; and the rent being reſerved half-yearly, without mentioning any day there, there muſt be a full half-year before it is due: but otherwiſe where it is made payable at ſuch and ſuch Feaſts, quarterly or half-yearly; there, though the quarters or half-year in reality be not then expired, yet as to the reſervation and payment it is.

* [97]

And here THE COURT ſaid, that in this caſe an action could not be brought for the rent until twenty days were paſſed; but it was due immediately after the Feaſt, and payable.

And here, foraſmuch as the rent declared on, and the rent reſerved by the deed, were quite different, THE COURT told the plaintiff that he could not *diſcontinue*, for this judgment could be no bar againſt the right rent (*b*).

(*a*) 4. Mod. 76. Salk. 262.

(*b*) And by HOLT, *Chief Juſtice*, POWEL and GOULD, *Juſtices*, againſt the opinion of POWYS, *Juſtice*, judgment was given for the defendant; for where there are ſpecial days of payment limited upon the *reddendum*, the rent ought to be computed according to the *reddendum*, and not according to the *habendum*. But where the reſervation is general, as half-yearly or quarterly, and no ſpecial days are mentioned, there the half-year or quarter muſt be computed according to the *habendum*.—S. C. 2. Ld. Ray. 819.

Anonymous.

Anonymous. Caſe 124.

OWEN AND OTHERS of the *City of Coventry* were bound by recognizance, and appeared for two Terms; and no proſecution being againſt them,

The Court, on default of proſecution, can only *reſpite*, and not *diſcharge*, a recognizance.

IT WAS MOVED to diſcharge their recognizance, or diſpenſe with their appearance.

But THE COURT ſaid, they could not do it; and all they could do was to reſpite their recognizance.

Ode *againſt* Norcliff. Caſe 125.

Eaſter Term, 1. Anne, Roll 380.

IN AN ACTION on a bill of exchange it was pleaded in *abatement*, that the defendant was one of the clerks of the court of common pleas, and ought not to be ſued out of that court without his conſent. The plaintiff replied, that the defendant conſented, but laid no *venue* where.

A replication that a clerk of *C. B.* conſented to be ſued in *B. R.* muſt lay a *venue*.

And PER CURIAM, It is therefore bad.

S. C. 1. Salk. 4. S. C. 3. Salk. 283. S. C. 2. Ld. Ray. 869. Poſt. 106. Stra. 837. 864. Ld. Ray. 135. 337. 702. 869. 1173. 1208. 1556.

Anonymous. Caſe 126.

A CERTIORARI iſſued to remove orders made concerning *foreign ſalt*, and the orders returned were concerning *ſalt in general*.

A *certiorari* to remove an order relating to *foreign ſalt* will not remove one relating to *ſalt* generally.

AND IT WAS HELD they were not well removed; for a ſpecial *certiorari* cannot remove general orders, though a general *certiorari* will remove ſpecial ones.

4. Hawk. P. C. 164.

Goodwin *againſt* Hilton. Caſe 127.

PENDING A WRIT OF ERROR, the bail rendered their principal the twentieth of *December* before; and in the *February* following, the defendant meeting the plaintiff at large, told him, that he had * rendered himſelf in diſcharge of his bail.

Bail render the principal.

S. C. ante, 77.

* [98]

The plaintiff's attorney having no notice of the render, took out *a capias* againſt the principal, and a *ſcire facias* againſt the bail, who pleaded *nul tiel perſon* as the principal *in rerum naturâ*; and upon examination of the regularity of the render this matter appeared.

8. Mod. 129. 1. Peer Wms. 685. Stra. 915. 642. 1217.

It was agreed by the Court,

FIRST, That bail might well render during a writ of error (*a*).

(*a*) See Tidd's Pract. 144, 145.

Goodwin *againſt* **Hilton.**

Secondly, That by courſe of the Court, there ought to be an entry made by the defendant's attorney, with all convenient ſpeed, in a book to be kept for that purpoſe in the office of the king's bench, to the intent the plaintiff may know how to proceed; that is, to charge the party in execution, or to take a *fieri facias* or other writ.

Thirdly, That by the late rule of Court, beſides this entry, there muſt be two days notice to the plaintiff's attorney before *a committitur* can be entered, or a diſcharge upon the bail-piece.

Reddidit ſe.
Ante, 85. 77. 51.
6. Mod. 309.
3. Salk. 57. 198.
2. Show. 398. 443.
Ld. Ray. 156. 342. 353.

Fourthly, It was alſo agreed, that the courſe of render is upon the *reddidit ſe*, ſigned by the Judge, to get a certificate from the clerk of the paper to the maſter of the office, which is his warrant to enter a diſcharge upon the bail-piece; but ſuch certificate does not make the *reddidit ſe* better or worſe.

And here was an entry made in the book kept in the office not only long before the ſecond *ſcire facias* was returned, but likewiſe long after the *reddidit ſe*; and it would have been well as to that, but that it appeared the defendant had eſcaped long before.

Caſe 128. Anonymous.

Coſts.
Executor.
Poſt. 118.

PER CURIAM.—An executor ſhall pay coſts for not going on to trial (*a*).

6. Mod. 91. Ld. Ray. 437. 865. 1413. 8. Mod. 108. Comy. 162. 1. Peer. Wms. 482. 593. 2. Peer. Wms. 285. 3. Peer. Wms. 347. Stra. 682. 871. 1106.

(*a*) By 14. *Geo.* 2. c. 17. "If a plaintiff, after iſſue joined, neglect to bring "on the iſſue to be tried according to "the courſe and practice of the Court, "judgment may be given for the defendant as in caſes of nonſuit, &c." But it is decided, that *an executor* and *an adminiſtrator* ſhall not pay coſts on judgment as in caſe of a nonſuit under this ſtatute. Howard *v.* Radburne, Barnes, 130. Bennet *v.* Cohen, 4. Burr. 1928. If, however, an executor or adminiſtrator do not proceed to trial purſuant to his notice, he ſhall pay coſts, Elwis *v.* Mocatto, 2. Ld. Ray. 865. S. C. 1. Salk. 314. Rex *v.* Powell, 1. Stra. 33. for by the conſtant courſe of the Court a defendant is intitled to coſts, if the plaintiff give notice of trial and neither go to trial nor countermand it in time, Rex *v.* Heydon, 3. Burr. 1305. So an executor or adminiſtrator is liable to coſts upon a judgment of *non proſ.* Hawes *v.* Sanders, 3. Burr. 1584. So alſo upon a *diſcontinuance*, where he has knowingly brought a wrong action, or otherwiſe been guilty of a default, Harris *v.* Jones, 3. Burr. 1451. But if the not going on to trial was not owing to the *laches* of the plaintiff, but proceeded from inevitable accident, an executor or adminiſtrator is not liable to coſts, Barnes, 316. Hullock on Coſts, 189.

Caſe 129. The Queen *againſt* Sir John Bucknal, Knt.

If the lord of a manor hold by the ſervice of *repairing a bridge*, all the alienees of the demeſnes of the manor are ſeparately liable to the whole charge of repairs.—S. C. ante, 54. S. C. 1. Salk. 358. S. C. Holt, 128. S. C. 6. Mod. 150. S. C. 2. Ld. Ray. 792. 804. 3. Salk. 77. 381.

SIR JOHN BUCKNAL was lord of the manor of *Le More* in *Hertfordſhire*, which manor was held by the ſervice of repairing a public bridge; and though all the demeſnes of the manor, except the copyholds, were aliened;

The Queen *againſt* Sir John Bucknal, Knt.

Yet the Court held, that all the alienees were chargeable in proportion, yet the queen might charge any of them with the whole, and let him have contribution againſt the others: And though the lord * had nothing but the copyhold, yet forasmuch as the freehold thereof was in him, he was chargeable, and the Court would direct the information to be againſt all the parties liable; but let him that is charged have his remedy againſt the reſt.

Anonymous.

Caſe 130.

HOLT, *Chief Juſtice*, declared, that if complaint were made to him, that a juſtice of the peace had iſſued a warrant to take away goods out of a man's poſſeſſion to which he pretended a right, he would ſend for the juſtice and bind him over; for people muſt take the legal remedy, that is, *detinue*, *trover*, or *replevin*.

A warrant muſt be grounded on a legal information.

Noy, 103. 1. Sid. 192. Poph. 153.

Cro. Jac. 643. Stiles, 182. 1. Roll. Rep. 247. Ld. Ray. 556. 767. 858. 871. Stra. 8. 710. 1008.

Wortley Montague *againſt* Lord Sandwich.

Caſe 131.

UPON motion for *a new trial*, the caſe appeared to be thus:

What ſhall be evidence of converſion.

An executor ſeveral years before had left ſome houſhold-ſtuff in the houſe by the conſent of the heir, who uſed them afterwards; and within ſix years of the action brought, the executor demanded the goods, and the heir refuſed to let him have them; whereupon trover was brought, and the ſtatute of Limitation pleaded.

And by the Court, The uſer before the demand was no converſion nor evidence of it; for it was with the conſent of the executor till then. And the demand being within ſix years, the refuſal which enſued it, and is the only evidence of a converſion in the caſe, was within the ſix years; and if a trover be before ſix years, and a converſion after, the ſtatute cannot be pleaded.

Ante, 5. 12. 2. Salk. 422. 521. Ld. Ray. 283. 838. 1099. 1101. 1. Vern. 456. Fitzg. 170. 289. 1. Peer. Wms. 742. Stra. 556. 736. 907.

The Queen *againſt* Sturney.

Caſe 132.

STURNEY was convicted in a ſummary manner on the ſtatute of the 13. & 14. *Car*. 2. for a fraud in a cuſtom; and the conviction being removed here was quaſhed on motion.

For per Curiam, The ſtatute directs no particular way of trial, but only that the offender ſhall be fined at the ſeſſions; and

If a ſtatute create an offence, without ſaying how it ſhall be tried, it ſhall be tried by a jury.

Comb. 8, 14. 3. Salk. 329. 331. Ld. Ray. 347. 714. 991. Stra. 829. 943. 952.

whenever an act of parliament makes an offence, and is ſilent on the manner of trying it, it ſhall be intended to be a trial *per pais* according to Magna Charta.

* [100*]

Caſe 133.

* The Queen *againſt* Darby.

A perſon convicted of ſubornation of perjury, may, after judgment *quòd capiatur pro fine*, move in arreſt of ſuch judgment, when brought into court upon the *capias*.

S.C. 1. Salk. 78. 2. Show. 1, 2. 1. Lev. 118. 6. Mod. 202.

DARBY being convicted of *ſubornation of perjury*, and a judgment, *quòd capiatur pro fine*, and brought in upon the *capias*, offered to move in *arreſt of judgment*.

The Court and Bar ſaid, they never had known a motion in arreſt of judgment, after a judgment *quòd capiatur pro fine*.

It was insisted on *for the Queen*, that the judgment was complete: but the certainty of the fine could not be known until the party be brought into court, and that in the mean time there is a ſhort entry made of the judgment, *quòd capiatur*: But after the fine is ſet, then there is an entry made at large, and that is called the fine-roll; and if judgment ſhould be arreſted now upon the motion, the entry muſt be *quòd capiat inde ſine die*, which would be contrary to the judgment before, upon which the *capias pro fine* iſſued; and the judgment is as final as it can be, when it is *quòd capiatur pro fine*, though the roll be not made up until he be brought in upon the *capias*. And the firſt caſe in *Palmer* was quoted, where it was ſaid, that a writ of error would lie of this judgment before the fine ſet.

But note, There it was a judgment that he ſhould be ouſted of his franchiſe, and likewiſe taken *pro fine*; and they ſaid this was ſtronger than the caſe of ejectment; for there judgment is not complete until damages be found, and yet a writ of error lies of the judgment before any damages found; and the reaſon is, becauſe by the judgment that is given, the poſſeſſion is touched immediately; and where a judgment is final for any part, writ of error will lie.

And here they would have the *capias pro fine* to be in nature of an execution.

Quod Holt *negavit*, becauſe it is not certain; and he ſaid, that upon an interlocutory judgment in caſe or treſpaſs, a *capias pro fine* ſhall go, yet after they may move in arreſt of judgment; and theſe are likeſt of any to the caſe in queſtion. And it is not like a judgment *quòd computet*; for after ſuch judgment you cannot move in arreſt of judgment; for then there is no more to do, but to ſee what is behind.

And upon the doubt, time was given until the next day.

And it was agreed, that if ſo be it could not be moved in arreſt of judgment, it might very well be urged in mitigation of the fine; and for that the exceptions were heard.

* First, The information ſets forth, that there was a cauſe in *chancery* between *A.* and *B.* and that a commiſſion iſſued out of that court to examine witneſſes in the cauſe, and that *J. S.* was ſworn a witneſs before the ſaid commiſſioners (without ſaying in that cauſe, or what he had ſworn), that the defendant ſolicited him to forſwear what he had ſworn before; and it not appearing that the oath was in any cauſe pending, or that it was in any material point, were two exceptions; for that ought to be ſet forth, that the Court might judge whether it was a point material or not; for it could not be perjury if it were not, and then ſolicitation could not be a ſubornation.

In an indictment for ſubornation of perjury, it muſt appear that the party ſuborned committed the perjury.

Cro. Car. 337.
3. Mod. 122.
2. Hawk. P. C. 91.
4. Hawk. P. C. 85.
Stra. 921. 1230.

Secondly, That *J. N.* was to have been a witneſs in the ſame cauſe, and that the defendant went and deſired him to ſwear ſuch a particular thing, without averring that it was falſe, or that he knew nothing of it.

Theſe objections ſeemed of weight to The Court.

Holt, *Chief Juſtice.* How ſhall we judge of the nature of his offence, and, by conſequence, what fine to ſet, if we do not know it from the record of his conviction? If a man be indicted of perjury, and it do not appear what he ſwears, and that it was in a cauſe depending, and material to the point in iſſue, the indictment will be bad; and the Court is to judge what is material, and that they cannot do, if it be not ſet forth: and by the ſame reaſon, ſubornation muſt be of ſuch a thing as would be perjury if ſworn, and ſo muſt be ſhewn certainly.

2. Show. 12.
2. Salk. 514.
1. Salk. 374.
Comb. 460.
5. Mod. 343.
6. Mod. 167.

But as to the other point, it ſeemed to be a common-law offence (*a*), to offer money to ſwear to a particular thing whether true or falſe.

(*a*) 2. Burr. 1189.

MICHAELMAS TERM,

The Firſt Year of Queen Anne,

A T

The Sittings

A T

Weſtminſter,

BEFORE

Sir John Holt, *Knt. Chief Juſtice*

O F

The Court of Queen's Bench.

The Queen *againſt* Swanſon, Baynton, Hartley, and Spurr.

Caſe 134.

THE DEFENDANTS were all indicted upon the ſtatute of 3. *Hen.* 7. c. 2. againſt ſtealing of women, &c.

The indictment ſet forth the woman's age; that ſhe was an heireſs to *J. S.*; was worth in goods and chattels ſo much, and ſo much in land of inheritance; and that ſhe was a virgin.

The ſubſequent conſent of a woman forcibly married will not extinguiſh the offence.

Upon evidence, the caſe appeared to be thus;

Baynton, perſonating a country lady, though in truth a woman of the town, took a lodging in the houſe where *Mrs. Plaiſant Rawlins* * lodged (for that was her name), and after ſome time introduced the ſaid *Swanſon* into the houſe, as her brother, where he frequently had the converſation of the ſaid *Rawlins*. In the mean time, *Mrs. Baynton* uſed to magnify her pretended brother's merit and goodneſs, inſomuch that the ſaid *Rawlins* had likewiſe declared her liking of him, and wiſhed he would marry her. But to get her abroad without any of her friends, *Baynton* deluded her aunt and

S. C. Holt, 319.
S. C. 5. St. Tr. 453.
Poſt. 132.
Cro. Car. 493.
2. Vent. 243.
1. Hawk. P. C. 311.
Hale P. C. 119. 317.

* [102]

The Queen *againſt* Swanson, Baynton, Hartley, and Spurr.

her to go with her to church; and againſt the time, got bailiffs to take out a writ for *Rawlins* and her aunt, and ſo they way-layed and arreſted them, and conveyed them from *Weſtminſter*, where they lived firſt, to the *Garter Tavern* in *Drury-lane*, and there ſeparated the aunt and her, and carried her to *Holborn* to the *Vine Tavern*, where *Swanſon* came as her bail, and there married her, continuing under the arreſt; *Baynton* telling her, that if ſhe did not marry him ſhe muſt go to *Newgate*.

Swanſon and *Baynton* were found guilty:

For the Court delivered it to the jury for law, that though the ſaid *Rawlins* had a fancy for the man, yet becauſe ſhe was not privy to the contrivance of coming out to him, and knew not before-hand, or conſented ſo to come to him, and being married whilſt ſhe continued under that reſtraint and violence, though perhaps ſhe conſented to the marriage, yet the ſaid fact was a crime within the ſtatute; for here was a forcible taking away, and her ſubſequent conſent, while under the reſtraint, could not be looked upon but an effect of the continuing force; and that though *Swanſon* had known nothing of the firſt force, yet he knowing her to be under it, and marrying while he knew her to be under it, made him approve of the firſt force, and ſo partake of it, ſo as to be guilty.

Note, Upon this ſtatute all aiders and aſſiſters are principals.

And Note, The man was hanged.

Hartly and *Spurr* the bailiffs were acquitted.

MICHAELMAS

MICHAELMAS TERM,

The Firſt of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt.* *Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Henry Gould, *Knt.*
Sir John Powell, *Knt.*
} *Juſtices.*

Edward Northey, *Eſq.* *Attorney General.*
Simon Harcourt, *Eſq.* *Solicitor General.*

Le Noyer's Caſe.

Caſe 135.

The record of an inferior court cannot be amended by the draft of Counſel.

Comb. 51. 126. 369.
Ld. Ray. 141. 209. 310. 324. 565. 669. 679. 683. 1058.
Stra. 846. 1197.

IN AN INFERIOR COURT the record was made, in the part of iſſuing the proceſs, "*præceptum fuit*," inſtead of "*præceptum eſt*."

And becauſe the draft of the Counſel given to the clerk, to enter up by, was right, it was moved now to amend the record by it.

But PER CURIAM, There never was any amendment by draft of Counſel; for it is a thing of no manner of authority, alterable at pleaſure, and no offence to * change it; and the caſe put of a bond, is not like this, for a bond is an authentic thing; and an alteration in it is forgery, and if the party himſelf do it, beſides the forgery, he avoids the whole bond. The ſtatute is to amend where there is a letter too much or too little, through the fault of the clerk.

* [103]

HOLT, *Chief Juſtice*, ſaid, he would gladly have an action brought againſt an attorney who makes ſuch a fault in entry, contrary

Le Noyer's Caſe.

contrary to the advice of Counſel; for they ſometimes do it out of malice, and ſometimes out of preſumption; beſides no *diminution* lies of a record of an inferior court (*a*).

(*a*) But ſee Comb, 370. that no diminution lies to an inferior court.

Caſe 136. Reignol *againſt* Taylor.

It need not be ſhewn, in ſetting forth the ſtyle of an inferior court, that it was held within the juriſdiction.

ERROR OF A JUDGMENT IN TRESPASS at *the Stannary Court.*

THE FIRST EXCEPTION was, that in the record ſent up they do not, ſetting forth the ſtile of the court, ſay, that it was held within the juriſdiction of the court.

S. C. Holt, 185. 1. Co. 51. Co. Lit. 58. 1. Roll. Abr. 533. 434. 1. Lev. 50. 69. 96. 105. 137. 156. 208. 289. 2. Lev. 87. 230.

HOLT, *Chief Juſtice*, and THE COURT. Where you declare in the inferior court, you ought to lay the fact, or cauſe of action, to have ariſen within their juriſdiction; or if you declare, that at a court held, ſuppoſe at *Maidſtone*, ſuch a thing was done, there you muſt ſay, that the court was held within their juriſdiction of the court; but when you only ſet forth the ſtile of a court, you need not ſhew it (*a*).

1. Mod. 32. 2. Mod. 141. 3. Salk. 216. 2. Show. 130. Ld. Ray. 211. 216. 230. 346. 796. 837. 1040. 1310. 1555. 8. Mod. 4. 77. 175. 374. 9. Mod. 95. 1. Peer Wms. 476. Stra. 256. 630. 786. 794. 827. 841.

A declaring in *the Stannary Court* muſt alledge the plaintiff to be *a tinner*.

ANOTHER ERROR was, that it was not alledged that the plaintiff was *a tinner*; and by ſeveral acts of parliament concerning their juriſdiction, they ought to ſhew it.

And for this the judgment was reverſed *niſi*.

4. Inſt. 229. 2. Roll. Rep. 379. 1. Bac. Abr. 653.

(*a*, See Rowland *v*. Veale, Cowp. 18. Trevor *v*. Wall, 1. Term Rep. 151.

Caſe 137. Cole *againſt* Henry.

The Courts will take notice on what day the king dies.

ERROR OF A JUDGMENT IN EJECTMENT in *Ireland*, in the court of queen's bench.

THE FIRST ERROR aſſigned was, that no juror's name was entered on the record.

* [104]

S. C. 2. Ld. Ray. 811. 6. Mod. 142. 1. Salk. 266. Ld. Ray. 151. 427 811. 879. 8. Mod. 1. 5, 6. 27. 184. Stra. 973.

HOLT, *Chief Juſtice*. When there is a full jury, there * never is an entry of their names in a ſuperior court.

THE SECOND ERROR aſſigned was, That the Judge who tried the cauſe, calls himſelf the Queen's Judge; and it nowhere appears that the king was then dead.

HOLT, *Chief Juſtice*. We are to take judicial knowledge who reigns over us, and whom we owe allegiance to; and though it be decent to take notice of the demiſe of the king, yet it is not of neceſſity.

And the judgment was affirmed.

Harwood *againſt* Parrot. Caſe 138.

An action will not lie for maliciouſly indicting another for a *treſpaſs*.
Poſt. 105.
1. Salk. 114. 119.
2. Show. 255.
Comb. 311.
3. Salk 63. 105.
Ld. Ray. 1035. 1208.

AN ACTION ON THE CASE was brought by huſband and wiſe, for maliciouſly indicting the wiſe of a riot.

The declaration contained two counts: FIRST, ſhewing the plaintiff's wife was of good reputation, and that the defendant, to leſſen it, indicted her of a riot, of which ſhe was acquitted; the SECOND count was the ſame, and that the huſband was put to great charge.

IT WAS HELD, as to the firſt count, to be no ſcandal to be guilty of *treſpaſs*.

And THE COURT, as to the ſecond count, inclined, that the huſband alone ought to have brought the action, for he alone could be put to the charges.

But they delivered no poſitive opinion.

Wood *againſt* Branford. Caſe 139.

On error in dower, a *certiorari* lies to inform the Court whether the infant defended by *attorney* or *guardian*.
S. C. poſt. 124.
6. Mod. 113.
1. Sid. 39.

ERROR OF A JUDGMENT IN DOWER in the court of common pleas, and *in nullo eſt erratum* pleaded.

It was aſſigned for error, that it was againſt *an infant*, who appeared by *attorney*, when he ſhould have appeared by *guardian*.

PER CURIAM. Though it be after *in nullo eſt erratum* pleaded, yet we may grant a *certiorari ad informandas conſcientias*, and a dowager is a kind of a purchaſer.

206. 1. Lev. 99. 1. Jones, 199.

Shield *againſt* Cliff. Caſe 140.

Miſnomer.
Ante, 38.
Comb. 40. 287.
1. Salk. 6.
6. Mod. 115.

CLIFF being ſued upon a bond, by the name of *Peter*, pleaded in *abatement*, that he was baptized by the name of *Paul*, and not by that of *Peter*; and concluded to *the country*.

And PER CURIAM, A *reſpondeas ouſter* was awarded.

3. Salk. 238. 2. Show. 504. Ld. Ray. 118. 509. 8. Mod. 113. 289. Comy. 41. 371. Stra. 356. 1218.

Haywood *againſt* Davis and Another. Caſe 141.

Pleadings in an action of treſpaſs.
Salk. 4. S. C.

MIDDLESEX, to wit. BE it remembered, that on *Friday* next after three weeks from the day of *St. Michael* in this ſame Term, before the lady the queen at *Weſtminſter*, comes *Rebecca Haywood* by *William Smyth* her attorney, and brings into the court of the ſaid lady the queen, now here, her certain bill againſt *Margaret Davis*, otherwiſe *Daviſon*, and *Mary Bonner* in cuſtody of the marſhal, &c. of a plea of treſpaſs, and there are pledges of proſecuting,

HAYWOOD *againſt* DAVIS AND ANOTHER.

Treſpaſs for breaking and entering of the plaintiff's cloſe and yard, and diſturbing the poſſeſſion.

proſecuting, namely *John Doe* and *Richard Roe*, which ſaid bill followeth in theſe words, that is to ſay, *Middleſex*, to wit, *Rebecca Haywood* complains of *Margaret Davis*, otherwiſe *Daviſon*, and *Mary Bonner* in the cuſtody of the marſhal of the marſhalſea of our lady the queen, before the queen herſelf being, for that they the ſame *Margaret* and *Mary*, on the firſt day of *October*, in the firſt year of the reign of our *Lady Anne*, now *Queen of England*, &c. with force and arms, &c. the cloſe and court-yard of the ſaid *Rebecca* in the pariſh of *Stebunheath*, otherwiſe *Stepney*, in the county of *Middleſex* aforeſaid, broke and entered, and her the ſaid *Rebecca* in the quiet uſe and occupation of the ſaid cloſe and court-yard did then and there diſturb and hinder; and alſo for that they the ſame *Margaret* and *Mary* afterwards, to wit, the day and year aforeſaid, with force and arms, &c. another cloſe and court-yard of the ſame *Rebecca*, in the pariſh and county aforeſaid, did break and enter, and five hundred pails of water and other water of the ſame *Rebecca*, to the value of twenty ſhillings, from and out of a certain fountain of her the ſame *Rebecca*, in the pariſh and county aforeſaid being, without the licence of her the ſaid *Rebecca* and againſt her will, from and out of the fountain aforeſaid then and there did take and carry away; and alſo, for that they the ſame *Margaret* and *Mary* afterwards, to wit, the ſame day and year laſt aboveſaid, with force and arms, a great quantity of dirt, ſoil, and water, in and upon the land and another court-yard of the ſame *Rebecca* in the pariſh and county aforeſaid, did then and there put, place, pour out, and caſt forth, and other enormities to the ſame *Rebecca* did then and there commit, againſt the peace of our ſaid lady the queen that now is, and to the damage of her the ſaid *Rebecca* thirty and nine ſhillings; And therefore ſhe brings this ſuit, &c.

Plea of tenancy in common in abatement.

And the ſaid *Margaret* and *Mary* in their proper perſons come and defend the force and injury, &c. and pray judgment of the ſaid bill of her the ſaid *Rebecca*, and that the ſame bill may be quaſhed, becauſe they ſay that the cloſe and court-yard, and alſo the places in which the ſaid treſpaſſes are ſuppoſed to be done, are, and at the ſame time in which, &c. were one acre of land, and that the ſaid *Rebecca* at the ſame time in which, &c. had nothing in the ſame acre of land, unleſs together and undividedly with the ſaid *Mary Bonner*, who is in full life at the pariſh of *Stepney* in the county of *Middleſex*: And this they are ready to verify. Wherefore they pray judgment of the ſaid bill, and that the ſame bill may be quaſhed, &c.

Replication.

And the ſaid *Rebecca* ſaith, that the aforeſaid bill of her the ſaid *Rebecca* for the reaſon before alledged ought not to be quaſhed, becauſe ſhe ſaith that ſhe, at the ſeveral times the ſeveral treſpaſſes aforeſaid are ſuppoſed to be committed, was ſole ſeiſed of the ſaid cloſe and court-yard in the declaration of her the ſaid *Rebecca* firſt mentioned, and alſo of the ſaid cloſe and court-yard in the declaration aforeſaid of her the ſaid *Rebecca* ſecondly mentioned, and

of

HAYWOOD *againſt* DAVIS AND ANOTHER.

of the aforeſaid fountain in that declaration in like manner mentioned, and alſo of the third court-yard in the ſaid declaration of the ſaid *Rebecca* thirdly mentioned, and that the aforeſaid *Margaret* and *Mary* at the ſaid ſeveral times when, &c. did commit the ſeveral treſpaſſes aforeſaid, as the ſaid *Rebecca* by her ſaid declaration above complains againſt them; without that, that the ſaid *Mary Bonner* at the reſpective times aforeſaid, or any of them, had any thing in the ſaid premiſes, or any of them: And ſhe prayeth that this may be inquired by the country.

Traverſe of the tenancy in common.

Demurrer.

And the ſaid *Margaret Davis*, otherwiſe *Daviſon*, and *Mary Bonner* ſay, that the plea aforeſaid by her the ſaid *Rebecca Haywood* in manner and form above by their ſaid replication pleaded, and the matter in the ſame contained, are not ſufficient in law to compel them the ſaid *Margaret* and *Mary* to anſwer the bill of her the ſaid *Rebecca*, to which ſaid plea they the ſame *Margaret* and *Mary* need not, neither by the law of the land are they bound in any manner to anſwer: and this they are ready to verify. Wherefore for want of a ſufficient replication of the ſaid *Rebecca* in this behalf, they the ſaid *Margaret* and *Mary* as before pray judgment of the ſaid bill of her the ſaid *Rebecca*, and that the ſame bill may be quaſhed. And for cauſes of demurrer in law in this behalf according to the form of the ſtatute in ſuch caſe lately made and provided, the ſaid *Margaret* and *Mary* here ſhew to the Court theſe cauſes following: For that the ſaid plea of her the ſaid *Rebecca* is double, uncertain, and wants form, and concludes to the country.

Joinder in demurrer.

And the ſaid *Rebecca Haywood* ſaith, that the plea aforeſaid, by her the ſaid *Rebecca* in manner and form aforeſaid in her replication above pleaded, and the matter in the ſame contained, are good and ſufficient in law to compel them the ſaid *Margaret Davis* and *Mary Bonner* to anſwer the bill aforeſaid of her the ſaid *Rebecca*; which ſaid plea, and the matter in the ſame contained, the ſame *Rebecca* is prepared to verify and prove as the Court, &c. And becauſe the ſaid *Margaret* and *Mary* have not anſwered that plea, nor have hitherto in any wiſe contradicted it, the ſame *Rebecca* prays judgment; and that the ſaid *Margaret* and *Mary* may further anſwer the ſaid bill of her the ſaid *Rebecca*, *&c.* But becauſe the Court of our ſaid lady the queen now here are not yet adviſed of giving their judgment of and concerning the premiſes, a day therefore is given to the ſaid parties before our lady the queen at *Weſtminſter*, until *Tueſday* next after eight days from the day of *St. Martin*, for hearing their judgment of and concerning the premiſes, for that the Court of our ſaid lady the queen now here is not yet thereof, &c.

Haywood *againſt* Davis and Another. Caſe 142.

TRESPASS againſt two, for taking a pail of water out of the defendant's well.

In treſpaſs againſt two, one defendant cannot plead a tenancy in common between the plaintiff and other defendant; but if he do, a replication of *ſole ſeiſin* traverſing the tenancy in common, may conclude to *the country*.—S. C. 1. Salk. 4.

HAYWOOD *againſt* DAVIS AND ANOTHER.

The defendant pleaded *in abatement*, that the other defendant and plaintiff were *tenants in common* of the well.

The plaintiff replied, that he was *ſole ſeiſed*; ABSQUE HOC, that he was *tenant in common* with any; and concluded to *the country*.

* [105]

Ante, 53. Comb. 86. 311. Ld Ray. 101. 137.

BRODERICK. * Where an ABSQUE HOC takes in the whole matter of the plea, there he who takes a traverſe, may conclude to *the country*; but where an ABSQUE HOC is upon a particular fact, which does not comprehend the whole plea, there he ſhall not conclude to *the country*, but *aver*.

And IT WAS AGREED BY ALL, that in the caſe of *abſque tali cauſâ*, one may conclude to *the country*.

Ante, 39. 1. Lev. 261. Ld. Ray. 312. 341. 737. 830. 871.

HOLT, *Chief Juſtice*. In treſpaſs, it is no plea *in abatement* for a defendant to ſay, he was *tenant in common* with the plaintiff, becauſe he may give it in evidence upon *not guilty*; but here the defendant who was a ſtranger pleads *tenancy in common* in the plaintiff with the other defendant, and that he may well do. And where one pleads *tenancy in common*, or *jointenancy* in abatement of the writ, and the plaintiff pleads in ſupport of his writ, he ſhall conclude to *the country* generally; for it is there an ABSQUE HOC upon a ſpecial occaſion to maintain his writ, and ABSQUE HOC there is merely put in for form; and is no more, than that the other who is ſeiſed jointly, or ſeiſed in common with him, has nothing there. Where you traverſe a ſpecial point, you muſt conclude with *an averment*, and not to *the country*; but this is not a traverſe of a ſpecial point.

And PER CURIAM, *Reſponſ. ultra*.

Caſe 143.

Wittingham *againſt* Broderick.

Treſpaſs for taking a wife's goods muſt be by the huſband only.—Ante, 104. 2. Show. 255. Comb. 185. 8. Mod. 26. 200. 341. Ld. Ray. 224. 443. 1031. 1208. Stra. 229. 726. 977. 1094.

JUDGMENT in the court of common pleas, in an action of treſpaſs by huſband and wife, for taking away their goods, was REVERSED, becauſe the wife ought not to join.

Caſe 144.

Crogate *againſt* Martin.

Mal concluſion cauſe of demurrer.

PER CURIAM. Not concluding to *the country* upon iſſue completely joined, is good cauſe of ſpecial demurrer.

* [106]

Caſe 145.

* Cliffton *againſt* Swezeland.

The manner of pleading privileges by an attorney.—S. C. Holt, 589. 1. Ld. Ray. 336. 2. Salk. 545. 2. Ld. Ray. 1172. 1. Stra. 76. 532.

THE DEFENDANT pleaded privilege of the common pleas in abatement, without concluding to the record.

HOLT,

CLIFFTON *againſt* SWEZZLAND.

HOLT, *Chief Juſtice.* He need not do it, but he may leave the plaintiff at liberty to reply; and deny his being a perſon privileged there, which the plaintiff cannot do if the defendant conclude to the record: And his not ſaying *prout patet* is no good cauſe of a general demurrer; and upon the *prout patet per recordum*, there ſhall go a *certiorari* to certify the record; and if they produce one and ſhew they have privilege, the plaintiff is eſtopped (*a*).

(*a*) See the caſe of Phipps *v.* Jackſon, 6. Mod. 305. Tidd's Pract. 51.

Clerk *againſt* Yewdall.

Caſe 146.

A declaration in *aſſumpſit* that the defendant would pay ſuch ſums as the plaintiff *rationabiliter habere mereretur*, is good.

QUANTUM MERUIT.—The plaintiff declared, that at the requeſt of the defendant, he had done ſuch and ſuch ſervices for him, and ſets them forth; and that in conſideration thereof the defendant promiſed to pay him *quantum mereretur:* There was a verdict for the plaintiff.

IT WAS MOVED *in arreſt of judgment*, that the conſideration being paſt, it ſhould have been *quantum merebatur* or *meritus fuiſſet*. In *aſſumpſit* for mariners wages (*a*), where it was laid, that in conſideration that *B. deſerviret* inſtead of *deſervivit*, the judgment was arreſted upon that exception.

S. C. 2. Ld. Ray. 835.
S. C. 2. Salk. 649.
Poſt. 108.
Ld. Ray. 1155.
Stra. 806.
Cro. Eliz. 149.
Cro. Jac. 370.
Cro. Car. 77.
Ray. 9.
Salk. 557.
1 Com. Dig. "Aſſumpſit" (H. 3.).

HOLT, *Chief Juſtice.* In all our judgments the entry is "*quòd recuperet*," which is a ſubjunct; and yet it is a preſent act, and not a future one, for it would be ill to make it future; and it muſt be tranſlated, "that he do recover," in the preſent-tenſe. So if preſent of potential or conjunctive be the ſame with preſent of indicative, why ſhall not preter-imperfect-tenſe of both moods be the ſame? And if this had been *merebatur*, you had allowed it good. And the merit is not paſt when the work is done, but continues until ſatisfaction.

And the plaintiff had judgment (*b*).

(*a*) Stiles, 444.
(*b*) See the caſe of Meverley *v.* Lee, 2. Ld. Ray. 1223. S. C. Salk. 558.

* How *againſt* Prin.

Caſe 147.

To ſay of a deputy lieutenant, juſtice of the peace, and intended candidate for a ſeat in parliament, "Do "not vote for "him, for he is "*a Jacobite*, who intends to bring in *the Pretender* and popery to deſtroy our nation," is actionable.—S. C. 2. Lutw. 1293. S. C. N. Lutw. 410. S. C. 2. Salk. 694. S. C. Holt, 652. S. C. 2. Ld. Ray. 812. S. C. 1. Brown's Caſes in Parl. 97. 1. Vin. Abr. 497. Ld. Ray. 236. 8. Mod. 270. 283. Comy. 439. Stra. 420. 617. 1157. 1168. 2. Show. 250. 3. Mod. 26. 2. Bl. Rep. 730.

IN AN ACTION ON THE CASE, the plaintiff declared, that he was A JUSTICE OF PEACE of the county of *Glouceſter*; and alſo DEPUTY LIEUTENANT of the ſame county; and that he did intend to ſtand candidate for A KNIGHT OF THE SHIRE of that county, to ſerve in the parliament to be held at *Weſtminſter* the thirteenth day of *November* the ſame year; that the defendant, knowing the premiſes, and intending to hinder him to be choſen

knight

How *againſt* Pain.

knight of the ſhire as aforeſaid; and alſo to diſcredit him in the country amongſt his neighbours, ſpoke theſe words: "Do not vote " for *How*, for he is *a Jacobite*, and for bringing in THE PRINCE " OF WALES," *innuendo* the pretended *Prince of Wales*, " and " popery;" *innuendo* the popiſh religion; " to deſtroy our " nation;" *innuendo* the nation of *England*.—And that at another time; *viz.* on ſuch a day in *May* laſt, he, the plaintiff, being A JUSTICE OF PEACE and DEPUTY LIEUTENANT of the ſaid county, and alſo A PRIVY COUNSELLOR to her preſent majeſty, the defendant did ſpeak theſe words of him: " I," *innuendo* the defendant, " was arreſted at the ſuit of the *Right Honour-" able J. How, Eſq.*" *innuendo* the plaintiff, " and it has coſt " me," *innuendo* the defendant, " five pounds for my breakfaſt; " and if you," *innuendo* the perſon to whom the words were ſpoke, whoſe name was ſet forth, " do not vote for him," *innuendo* the plaintiff, " he will ſerve you ſo too. I know why he did it: it is " becauſe I would not give my conſent to bring in popery and the " *Prince of Wales*, to deſtroy the nation."

Verdict, and four hundred pounds damages, for the plaintiff; and after many hearings in arreſt of judgment,

HOLT, *Chief Juſtice*, delivered the opinion of THE COURT.—I and my brothers have conſidered of this declaration, and although we never ſpoke of it together until now, yet we all happen to be unanimouſly of opinion, that both theſe words are actionable. As to the firſt words, it may be fit to explain the meaning of them. We take it that the true ſenſe of them, as they were ſpoken, was, That by them *Mr. How* was charged to be *a Jacobite*; and that he had a deſign, and a formed reſolution, to bring in the pretended *Prince of Wales* and popery, to the deſtruction of this nation of *England*. * It is objected, that this is no direct charge; and that of bringing in popery is uncertain; for it is not ſaid where it is to be brought in. But theſe words being ſpoke with reſpect to AN ENGLISHMAN, it muſt neceſſarily be underſtood, that he was for bringing of it into *England*, the words being ſpoke here by one *Engliſhman* of another. And it muſt be neceſſarily underſtood, that they are both *Engliſhmen*, for every man in *England*, *prima facie*, is to be underſtood to be of *Engliſh* birth, until the contrary appear. And for authorities here he quoted *Caudrey's Caſe (a)*, upon the ſtatute of 1. *Eliz.* c. 1. entitling her to iſſue commiſſions to her natural-born ſubjects to have eccleſiaſtical conuſance; and the objection was there taken to the ſpecial verdict, that it was not found the commiſſioners were natural-born ſubjects; and the anſwer to that was, that every one in commiſſion by THE QUEEN ſhall be intended to be a natural-born ſubject, until the contrary appears; and here it would be a very foreign intendment, to intend one that ſtands for parliament-man to be a foreigner, or a juſtice of peace to be ſo,

* [108]

Ante, 106.

(a) 5. Co.

till the contrary appear. Then if it be taken, that he was an *Engliſhman* here in *England*, of whom it is ſaid by an *Engliſhman* here in *England*, that he is for bringing in popery, it muſt be neceſſarily intended, that it was here in *England*, eſpecially when it is ſaid in the words, to be "to the deſtruction of our nation:" ſo that the words meant, that *J. How* was for bringing in popery into *England*, to the deſtruction of *England*. Beſides, if the words could have reference to the bringing in of popery into any other nation, it ought to be ſhewed on the defendant's ſide; and if that had been done, the verdict muſt have been for the defendant; for if the defendant had been *a Scotchman* or *a Dutchman*, and that had appeared upon the trial to the jury, in evidence, they muſt have given their verdict for the defendant; but, *primâ facie* being ſpoken of and by *an Engliſhman*, it ſhall be intended into *England*. And this appears upon the conſideration of *Cromwell's Caſe (a)*. To ſay a man is *a murderer* abſtractedly is actionable; but if the precedent diſcourſe will alter the ſignification which the words *primâ facie* bear, the defendant, upon action brought, muſt ſhew it; as in an action brought for ſaying the plaintiff * is "*a murderer*," the defendant pleads *not guilty*, and it is proved he ſaid it, he may ſhew that the precedent diſcourſe was about hunting, and that the plaintiff ſaid to the defendant, he had killed ſo many hares, upon which the defendant ſaid to the plaintiff, he was *a murderer*; that alters the ſignification of the words, and turns the verdict for the defendant. So here, if there were a communication concerning another country, with another man than *an Engliſhman*, that had altered the caſe, and the defendant muſt have been acquitted; but without ſuch mitigation, it muſt neceſſarily be intended, that he meant the plaintiff to be a perſon for bringing popery into *England*. As to *the Prince of Wales*, who is meant by that? You object, we cannot take notice of *a Prince of Wales*; for there is no ſuch perſon *in rerum naturâ*. We anſwer, at the time of ſpeaking thoſe words, the law of *England* takes notice of a pretended *Prince of Wales*; as appears by the ſtatute of the eighth and ninth of *William the Third*. So that there was a perſon, of whom the law took notice, living, and pretended to be *Prince of Wales*; and why is he called "pretended *Prince of Wales*," but becauſe he himſelf and others take notice of him as ſuch, and pretend him to be ſo. And he compared it to the caſe of *a baſtard*, ſuppoſed to be the ſon of ſuch a father; in law he is not his ſon; but when he has the reputation and pretence of being his ſon, that pretence is enough to give the law ſuch notice of him, as to enable him to purchaſe by that name. Therefore it is plain as can be, that *J. How* is by theſe words charged with a deſign to bring in the *Prince of Wales* and popery into *England*, to the deſtruction of it.

See Peake *v.* Oldham, Cowp. 275.

Then this being the natural ſenſe of the words, the queſtion is, Whether the words be actionable? I am not for declaring my

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(a) 4. Co. 12.

How againſt Prin.

opinion what the law would be, in caſe the words had been ſpoken of a private man, becauſe it is going further than we need, and to prejudge a point that is not now in queſtion, but may come in queſtion; and therefore for myſelf, I give this opinion only upon account of the perſon of whom they are ſpoke, as it appears on

* [110] the declaration. * It appears in the firſt words, that he was A JUSTICE OF PEACE in the county; and likewiſe A DEPUTY LIEUTENANT: and an action lies againſt a perſon for words ſpoke of one in an office, upon two accounts: FIRST, To charge one in an office under the late king, or preſent queen, with ſuch ill principles, that are of ſuch a nature that they make him unfit to bear that office or employment, is actionable. For if he had ſuch thoughts to bring in the pretended *Prince of Wales* or popery into this kingdom, it is fit he ſhould be removed from that truſt. Then he, as juſtice of peace, ought to puniſh popery, to proclaim thoſe that will not come to church, to try and commit them. Surely then, one that is for introducing popery, ought not to be intruſted with an office, the duty whereof is to puniſh and ſuppreſs it. SECONDLY, He is *deputy lieutenant*, and as ſuch he has power to defend the government of the county againſt all Pretenders; and his being of ſuch principles as he is hereby charged with, makes him obnoxious to the eſtabliſhed government; and not to be truſted by it in a poſt that is for defence of that government that he is ſaid to be ſo averſe to, when it may be for the advantage of the government to continue him in it, and a diſreputation to him to be turned out of it upon ſuſpicion. In the caſe of *Sir William Clarges* in the common pleas (*a*), he ſet forth, that he was a juſtice of peace, deputy lieutenant of ſuch a county, and likewiſe at the time of ſpeaking the words, that he intended to ſtand candidate for a borough, to be burgeſs in parliament, and that the defendant ſaid of him that he was "a papiſt;" he is not charged with any act of popery, but only that he was a papiſt, and that only ſhews what his principle and affection is; yet being ſpoke of one in an office of truſt, the whole Court of common pleas held that they were actionable, for the very being a papiſt is good cauſe to remove him out of his place; and that caſe did not reſt ſingly upon that reſolution, but a writ of error was brought of it into this court, and

* [111] here the judgment below was affirmed. * In the next place, if theſe words be well conſidered, they are ſtill more ſcandalous, for they do not only charge him with having ill principles, but likewiſe with having formed a deſign to put thoſe ill principles in execution, by bringing in popery and the *Prince of Wales*, even to the deſtruction of the nation. Then if he has ſuch a formed deſign, that is a very great crime; and the caſe of *Sir William Clarges* (*b*) is a very ſtrong caſe for me, and ſo is *Sir William Waldegrave's Caſe*, in *Coke* (*c*) and *Levinz* (*d*); and both the ſaid books agree in

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(*a*) 3. Lev. 50.

(*b*) Raym. 482. 3. Lev. 30. 3 Mod. 26. Skin. 68. 83. 1. Freem. 280.

(*c*) 3. Co. 191.

(*d*) 1. Lev. 355.

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How *againſt* Princ

the report of that caſe: He declared that he was a juſtice of peace, deputy lieutenant of the county, and a captain of the queen's guards; and that the defendant having diſcourſe of him with ſuch an one, his ſervant, ſaid, "Thou ſerveſt no true ſubject," without accuſing him with any particular act, but only generally, that he was not a true ſubject; and it was adjudged, that being ſpoke of one in that high ſtation, they were actionable; and that caſe has not been yet queſtioned, but on the contrary, was quoted for good law in *Yelv.* 202. 104. where an action was brought by a private perſon for ſaying, "he was not a true ſubject," and held it would not lie for a private perſon. The defendant's malice in ſpeaking theſe words, is pretty full upon this conſideration. **First**, They were ſpoke when the plaintiff had a deſign to ſtand for parliament-man, and that the defendant knew; and the words were with deſign to hinder his election, "Don't vote for *How*, "*&c.*" Why? Becauſe he is ſo and ſo principled, and ſo and ſo reſolved to put thoſe principles in execution; they were ſpoken on purpoſe, and that is a great indication of malice; and he deſigned credit ſhould be given to his words. It may be objected, that he deſigned to bring in popery and the *Prince of Wales*, by act of parliament. But that is a very ſtrange way of introducing it in a proteſtant country. But ſuppoſe we ſhould intend it here, are theſe perſons fit to be entruſted in a proteſtant government, or to be choſen members of their parliament, that would be for making a law to ſubvert the government and our religion, and to ſet up a Pretender to the prejudice of the title of the queen? And is not that occaſion to remove him? And even in that ſenſe, the words would be highly ſcandalous, and it would be time to * remove [* [112]] him out of an employment, which gives him ſuch credit in the country. It is objected, that he is not charged with any act done; but this objection is anſwered before, in the caſe of *Sir Walter Clarges* (*a*), and alſo that of *Sir William Waldegrave*; and to make words ſcandalous, it is not neceſſary to charge one with an act; but it is enough to charge him with having an ill deſign, and ill principle. In *Brownlow* (*b*), the defendant ſaid of the plaintiff being an attorney, "He is a very good attorney, but he will plead "on both ſides;" he does not ſay that he ever has done it, only that "he will plead on both ſides;" and held they were actionable, becauſe it ſhews he was of knaviſh and corrupt inclination. Alſo in the caſe of *Ellis v. Hunt* (*c*), where the plaintiff ſet forth that he was a journeyman ſhoemaker, and a cutter of leather, and that the defendant ſaid of him to his maſter, "You keep ſuch a one, who "will cut you out of doors;" and the words "cutting out of "doors," were taken in the ſenſe, that he would undo him; and there the plaintiff is not charged with doing any act, but only that he would do it; and yet the words were judged actionable, becauſe of his ill intent. It is objected, that this office of juſtice of peace, or of deputy lieutenant, are not offices of any profit;

(*a*) 3. Mod. 26. (*b*) 1. Brownl. 5. (*c*) 1. Roll. Abr. 86. March, 1.

How *againſt* Prin.

therefore being turned out of ſuch employment is no loſs to him. And the caſe of *Major Bill* (a) was quoted, "You a juſtice of "peace! You will make ſuch another juſtice of the peace as "*Major Bill*, who is a blockhead, an aſs, a coxcomb, and a "buffle-headed juſtice;" and it was adjudged that an action did not lie for theſe words, becauſe he was not accuſed of any corruption in his employment, or any ill deſign or principle; for it was not his fault that he was a blockhead, &c. for he cannot be otherwiſe than his Maker has made him; but if he had been a wiſe man, and had wicked principles charged upon him, when he has not them, an action would have lain; for though a man cannot be wiſer, yet he may be honeſter. If a man be in a place of profit, and he be accuſed of inſufficiency, he ſhall have remedy by action; but if he be only in a place of honour, he ſhall not have action for words of inſufficiency; but even there, if he be accuſed of ill principles, and ill-affected to the government, he ſhall have an action. *[113] And the ſcandal in the preſent caſe goes farther; for it muſt be ſuppoſed, that the defendant deſigned to be believed, when he ſpoke theſe words, becauſe he uſed this argument to hinder others from voting for the plaintiff; for he who hears him, muſt believe that he has detected this either from ſome ſpeech or ſome act done by him the plaintiff; for no man is ſuppoſed to know the deſign or purpoſe of another but from his words or act; and therefore when one ſays poſitively that *A.* is for ſuch a thing, he muſt take upon himſelf that he has detected ſome act or word of him, that gives him good reaſon to make this inference. And it is the moſt reaſonable thing in the world, to adjudge ſuch words to be actionable; for they that are in public employment would find it impoſſible to act with temper, if the law did not give them remedy; for if the defendant had not been brought to an account for thoſe words, what would become of *Mr. How?* For it would be preached up in all the country, and there would be no way to hinder it; it would at laſt run to common fame, and that alone is good cauſe to hinder a man's being employed; for no man that is under an ill fame ought to be truſted with a place or employment of truſt, and then no man could ſafely be in his place. The ſecond words are actionable for the ſame reaſon before given; and though it be objected, that the ſecond words, at leaſt the latter part of them, are nonſenſe, "He arreſted me for not conſenting with him "to bring in popery and the *Prince of Wales*;" for none can be arreſted for not conſenting to ſuch a thing; the anſwer is, that the not doing of it cannot be the cauſe or foundation of the action, but it may be the motive why he was arreſted.

By THE WHOLE COURT judgment was given for the plaintiff; and afterwards the judgment was affirmed in the HOUSE OF LORDS.

(a) 1. Salk. 659.

Harrow's Caſe. Caſe 148.

LIBEL IN THE SPIRITUAL COURT for ſubſtraction of tithes, for agiſtment of cattle.

They pleaded below that they were *inhabitants* of that pariſh, and the other tithes were better for the agiſtment of cattle there; and this matter they alſo ſuggeſted for a prohibition; but in their declaration upon a prohibition, they alledged they were *occupiers*.

A declaration in prohibition variant from the ſuggeſtion, is bad.

Poſt. 137.

Ld. Ray. 130. 220. 587. 835. 991. 1172. 1211. Gilb. Eq. Rep. 230.

* PER CURIAM. The declaration ought not to vary from the ſuggeſtion, and if you do not declare purſuant to ſuggeſtion, a *conſultation* ought to go; for if you diſcontinue your prohibition, it ſhall go of courſe; and the reaſon why agiſted cattle ſhall not pay tithes, is, becauſe the other tithes of the ſame pariſh are the better for the agiſtment there.

* [114]

HOLT, *Chief Juſtice.* If you have a houſe in one pariſh and live there, you muſt not pay agiſtment for dry cattle there. But if you be not a houſe-keeper there, you muſt pay tithes for agiſtment. And if there be cattle of the plow agiſted in another pariſh, they muſt pay tithes there where they agiſt, becauſe they are not cattle of plow there.

Cattle ſhall not pay tithes for *agiſtment* in the pariſh where the owner reſides.

Cro. Eliz. 446. Hard. 184.

THE COURT gave them leave to diſcontinue upon paying coſts, and to pray another prohibition.

Salk. 655. 3. Com. Dig. "Diſmes" (H. 5).

Anonymous. Caſe 149.

PER CURIAM. If a pauper be nonſuit, there ſhall be coſts taxed, and he ſhall not afterwards go on without paying the coſts, or ſhewing, according to the ſtatute 23. *Hen.* 8. c. 15. ſ. 2. that he was whipped (*a*).

A *pauper* nonſuited ſhall pay coſts.

1. Sid. 261. 2. Salk. 506.

Prec. Chan. 219. Fitzg. 161. 8. Mod. 344. 3. Peer. Wms. 258. Stra. 420. 878. 891. 1041. 1121. 1215. Hullock on Coſts, .

(*a*) But ſee Sloman *v.* Aynel, Fort. 320.; Blood *v.* Lee, 3. Wilſ. 24. *contra*; and alſo Hullock on Coſts, 210 to 222, where all the caſes on this ſubject are collected.

Le Sage *againſt* Pere. Caſe 150.

AFTER JUDGMENT in debt upon bond, THE COURT will not make a rule upon a plaintiff to take his principal, intereſt, and coſts.

Principal, intereſt, and coſts.

6. Mod. 11. 60. 153.

And THEY HELD in ſuch caſe, the plaintiff ought to have his full coſts out of the penalty (*a*).

Stra. 787. 890. 638. 957.

(*a*) See 4. & 5. *Ann.* c. 16.

Caſe 151. The Queen *againſt* Lee.

Quære, Whether a perſon in cuſtody of the marſhal of the king's bench, on *meſne proceſs*, can be charged with a *capias* on a writ of *excommunicato capiendo*.
Ante, 52.

Ld. Ray. 848. 1573.
Stra. 413. 873. 1245.
4. Com. Dig. 109.

IT WAS MOVED, that *Lee* being in THE MARSHAL's cuſtody might be charged with an *excommunicato capiendo*. Here was an *excommunicato capiendo* taken out of chancery, and a *non eſt inventus* returned.

IT WAS URGED, that it was to no purpoſe to take out another, when he is actually in cuſtody of the officer of the court; and it was compared to the caſe of one in cuſtody upon *meſne proceſs* at the ſuit of *A* he ſhall be charged in execution at the ſuit of *B*.

But IT WAS ANSWERED *on the other ſide*, that there was a vaſt difference; for the *capias* upon a judgment is, *ita quòd habeas corpus ejus* here at the return of the writ, and there in a manner the Court is poſſeſſed of him, becauſe there the * proceſs is to bring him in hither; but upon an *excommunicato capiendo* to the ſheriff, the ſheriff is not to bring him hither, but to keep him in gaol, and he is not to bring him hither but upon *habeas corpus*; and how can the Court lay hold on one that has no day in court, and is not before it?

* [115]

THE COURT aſked, if the ſtatute of 5. *Eliz*. c. 23. had not been, what remedy they had?

And IT WAS AGREED there was none in that caſe; but the ſtatute has made this difference, for it makes the proceſs iſſuable in this court, and returnable here; but does not order the ſheriff to bring the party in, but to take him and keep him.

HOLT, *Chief Juſtice*, agreed, if he were taken by *excommunicato capiendo* firſt, and brought up here by *habeas corpus* to anſwer an action in this court, then he ſhould be turned over to the marſhal, charged with *excommunicato capiendo*. But here there is a proceſs out of this court, which gives him a day here, which the *excommunicato capiendo* does not; and the reaſon of that is, becauſe he cannot be in two ſeveral priſons at once.

But here they would not help, but conſider until next Term.

Caſe 152. Anonymous.

In what caſes the preſence of an attorney is neceſſary to render a warrant of attorney, given by a priſoner, valid.

HOLT, *Chief Juſtice*. If a man be arreſted at the ſuit of *A*. and while he is under confinement of the bailiff, he give a warrant of attorney to confeſs a judgment, if there be no attorney by, it is always taken to be *by dureſs*.

But when one is in gaol a good while, and then another that is his creditor, or ſuppoſed to be ſo, comes to him, and he voluntarily

Poſt 119. 5. Mod. 144. 1. Lilly, 44. Ld. Ray. 357. 797. 850. 1. Bac. Abr. 188. Cowp. 141. 281. 4. Term Rep. 433.

without any compulſion confeſſes a judgment to him, that judgment ſhall ſtand, though there be no attorney.

And if one be impriſoned in the *King's Bench*, and confeſs judgment or action to another, it ſhall be good; as if the declaration be delivered to one in cuſtody of THE MARSHAL, and he confeſſes the action and gives judgment, though there be no attorney by, it ſhall ſtand.

Taylor *againſt* Griffith. Caſe 153.

INDICTMENT of forcible entry and detainer concluded *contra pacem* of the *late king* and *preſent queen*; the entry being in *King William's* time, and detainer in the *Queen Anne's* time.

Forcible entry in the time of one king, and detainer in that of another, muſt not conclude *contra pacem* of both.

Per HOLT, *Chief Juſtice.* The concluſion is very improper, but there are too many that way to reverſe them all.

But it was quaſhed upon the objection, that it did not appear what eſtate the party had, whether freehold, for years, or at will: and ſo the Court could not tell what execution to award; * but if the eſtate were ſet out, perhaps the poſſeſſion ſhould be reſtored to one, and the freehold to another: and here beſides it was not ſaid, that there was a diſſeiſin of him that had the freehold.

* [116]

An indictment of forcible entry muſt ſhew the kind of eſtate of which the party was diſſeiſed.

Poſt. 123. 138.

And it was quaſhed.

Ld. Ray. 610. 1. Vent. 306. 1. Sid. 102. 1. Mod. 73. Salk. 260. 1. Hawk. P. C. 41.

Thimblethorp *againſt* Hardeſty. Caſe 154.

HE brought an action as PRINCIPAL of *Furnival's Inn*, and declared upon an *inſimul computaſſet* with him for ſeveral ſums of money due to him and THE SENIORS of the ſociety.

An action for money due to an *Inn of Chancery* will not lie in the name of *the Principal* only, but muſt be brought in the joint names of *the Principal* and *the Ancients*.

And after verdict IT WAS MOVED *in arreſt of judgment*, that it cannot be his debt upon this promiſe; for by his declaration, the ſeveral ſums are laid to have been due to him and the ſeniors of the ſociety, and the promiſe, whether expreſſed or implied, yet ſtill it muſt be a promiſe to them whoſe debt it was; therefore they all ought to join in the action.

Here IT WAS AGREED, that churchwardens might bring an action in their name for the debt of the pariſh, for they are A CORPORATION; but here the plaintiff is none: and *the Principal* and *Ancients* ought to join, not as Principal and Ancients, but as they are natural perſons. If an accompt be made with the *Dean of Weſtminſter* for money due to the *Dean and Chapter of Weſtminſter*, this is an accompt with the *Dean and Chapter*, and the action muſt be brought in their names; that is, in their politic name. If plaintiff be truſtee for the ſociety of this houſe, he may ſue in his own name.

Co. Lit. 164.
3. Lev. 362.
12. Mod. 413.
Ld. Ray. 79. 127. 596. 775. 952. 1134. 1535
2. Peer. Wms. 511.
Stra. 1045.

THIMBLETHORP *againſt* HARDESTY.

And PER CURIAM, A promiſe to one here is a promiſe to all, and all of them muſt join in an action brought upon that promiſe, even upon an actual promiſe. And the debt upon the account ſtated, ariſes to ſo many particular perſons, and they all ought to join in the action; and though the defendant be one of them, yet the promiſe is to all the reſt, excluding himſelf; and all the reſt are joint-tenants againſt him; and a note made to one of the ſociety by another of them, is a note to all except him that gives it. As if there be twenty partners, and one of them covenant with all the reſt, he is in that reſpect ſeveral from them all, and they all joint againſt him.

And judgment arreſted PER TOTAM CURIAM.

*[117]

Caſe 155. * How *againſt* Granville.

After aſſignment of bail-bond, *bail to the ſheriff* cannot be excepted to as *bail above.*
Ante, 72.

PER CURIAM. After aſſignment of a bail bond, if the defendant put in the ſame bail that were put in to the ſheriff, the plaintiff cannot except againſt them; but it is otherwiſe if he has not taken an aſſignment; and upon action brought againſt the bail, they are not held to bail.

1. Salk. 97. 6. Mod. 122. Tidd's Pract. 135.

Caſe 156. Anonymous.

Ante, 53. 64.
1. Salk. 273.
2. Salk. 645.

A NEW TRIAL was denied after *view*, there being evidence of both ſides.

653. 6. Mod. 22. 222. 242. Stra. 1105. 1142.

Caſe 157. Dr. Watſon's Caſe.

A writ of *excommunicato capiendo*, reciting that the party was condemned in coſts *in quodam negotio officii ſive correctionis*, is bad for uncertainty.
S. C. ante, 56.
S.C. 2. Ld Ray. 817.
S. C. Carth. 484.
S C. 1. Salk. 106. 294. 350.
Stra. 43. 76. 946. 1067.
4 Com. Dig. "Excommengement" (B 4).

DR. WATSON was brought up, and prayed to be diſcharged for the fault in the writ.

HOLT, *Chief Juſtice.* The caſe of *The King v. Fowler (a)* was thoroughly conſidered, not only as to the proceſs with penalty, but alſo, whether it was not neceſſary, ſince the Court is to award future proceſs, to know the cauſe of excommunication in the writ? And we then thought that it was neceſſary, for this reaſon, becauſe the chancery now have no power on the writ; but the power which they had, is by the ſtatute of 5. *Eliz.* c. 23. given to this court; therefore, ſince this Court is to award proceſs, they muſt know that it is matter of eccleſiaſtical conuſance; and there is no other way for them to know that, but by its appearing on the writ; for chancery cannot relieve in the caſe, becauſe the writ is in this court: If the cauſe of excommunication be not ſufficient, the party has no remedy but in this court; therefore the ſtatute, by neceſſary conſequence of law, has made this Court judges of the writ of *ſignificavit*. And ſo the very ſtatute intimates when it ſays, that in caſe it be one of the nine cauſes, we ſhall award proceſs with penalty; for how can we do that, if the cauſe do not appear upon the writ, and that from the grounds that we went upon in the judgment?

(a) 1. Salk. 253.

Powell, *Juſtice*. The form of the writ was general before, but ſince the ſtatute of 9. *Car.* the proceſs is altered; and ſurely the Court muſt know whether you have juriſdiction below, as, before this ſtatute, they muſt have ſatisfied the chancery; and after the writ is once here, the chancery has no * more juriſdiction.

Eyre ſaid, the chancery took it they had juriſdiction ſtill, for they had quaſhed an *excommunicato capiendo* there that very morning;

Which Holt, *Chief Juſtice*, ſaid, they could not do by law.

And *Dr. Watſon* was diſcharged, and as many writs as were returned were quaſhed.

Anonymous.

Caſe 158.

MANDAMUS moved for to ſwear in a ſurgeon to *an hoſpital.*

Holt, *Chief Juſtice*, ſaid, it could not be, for he was but a private ſervant; and it was agreed, that *a mandamus* had gone to ſwear *a ſexton* (*a*).

The rule was for them to ſhew cauſe.

A mandamus does not lie to an hoſpital to ſwear in *a ſurgeon.*
Ante, 37. 83.
Poſt. 140. 143.
Ld. Ray. 989.
Stra. 536. 686.
881. 1192.

(*a*) See 2. Roll. Abr. 234. March, 101.

Anonymous.

Caſe 159.

HABEAS CORPUS cannot be after judgment.

Habeas corpus.
1. Salk. 352.
Fitzg. 111. 264.

Anonymous.

Caſe 160.

IF one diſtrain again for the ſame rent, the remedy is *recaption*; and if the ſheriff refuſe *a replevin*, an action lies againſt him.

Replevin is the remedy for a ſecond diſtreſs.
Stra. 717. 851. 1040. 1272.

Anonymous.

Caſe 161.

UPON motion of *Trigg* againſt the ſheriff of *Kent*, Holt, *Chief Juſtice*, ſaid, that if a ſheriff return goods levied to ſuch a value, he muſt anſwer for goods to that value, and plaintiff

The ſheriff is anſwerable for the goods levied; and he may be compelled by *diſtringas* to ſell them.—1. Salk. 318. Ld. Ray. 252. 346. 482. 674. 718. 729. 999. 1073. 1075. 2. Vern. 239.

may

Anonymous. may have a *venditioni exponas*; and if he will not ſell them, then the way is to have *a diſtringas* to the coroner; and that is the right method to lay him by the heels until he has ſold; and ſurely debt will lie againſt him after ſuch a return, and a *venditioni exponas* (*a*).

(*a*) See the caſe of Clerk *v.* Withers, 6. Mod. 290. 11. Mod. 34. 2. Ld. Ray. 1072. 2. Tidd's Pract. 747.

Caſe 162. Anonymous.

Notice of trial. Ejectment. Poſt. 150.

IN EJECTMENT, if the defendant has not regular notice of trial, the way is not to confeſs leaſe, entry, and ouſter, but to oppoſe judgment againſt the caſual ejector.

Caſe 163. Anonymous.

Adminiſtrator. Coſts. Ante, 98. Comy. 162.

AN ADMINISTRATOR ſhall pay coſts for not going on to trial (*a*).

(*a*) See ante, 98. Salk. 314. 3. Salk. 105. 2. Ld. Ray. 866. 1. Stra. 33. 3. Burr. 1305. 1585. Ogle *v.* Moffat, Barnes, 133. Bennet *v.* Coker, 4. Burr. 1927. Nunez *v.* Modigliani, 1. H. Bl. Rep. 217.

Caſe 164. Anonymous.

Certiorari. 1. Salk. 144. 10. Mod. 278.

IT is unuſual to ſend *a certiorari* without a ſpecial cauſe. 4. Hawk. P. C. 144.

MICHAELMAS

MICHAELMAS TERM,

The Firſt of Queen Anne,

AT

The Sittings in Middleſex,

BEFORE

Sir John Holt, *Knt. Chief Juſtice*

OF

The Queen's Bench.

Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

The Queen *againſt* Sewel, *alias* Beaus.

Caſe 165.

Evidence.
Uſury.

THE DEFENDANT was *indicted* for uſury, in taking nine pounds for the uſe of forty-five pounds for a year, *contra formam ſtatuti.*

1. Saund. 294.
1. Mod. 69.
2. Mod. 307.
3. Mod. 35.
Comb. 92. 125. 133.
2. Salk. 680.

The caſe was, The defendant lent the proſecutor forty-five pounds upon a pledge of jewels, and it was agreed to pay the ſaid intereſt. Afterwards, the proſecutor gave his bond for the ſame * money, and the bond not being diſcharged, the proſecutor was produced as an evidence;

*[119]

And he was ſworn by HOLT, *Chief Juſtice, de bene eſſe*, as he ſaid: and he ſaid, it was a queſtion, Whether the new bond were void or not? And he put this caſe: A man makes a uſurious contract, and gives him unlawful intereſt, and agrees to give him a bond for the principal; and after, by a ſubſequent agreement, gives a bond for the ſum lent to *J. S.* to whom the lender owes ſo much, in ſatisfaction of his debt; this bond is not voidable by the ſtatute, THE QUEEN *againſt* SEWEL, *alias* BEAUS.

ſtatute (*a*). If a man lend money for the legal intereſt, and afterwards, a ſubſequent agreement is made for more intereſt, which is uſury, that will not avoid the firſt contract.

1. Saund. 294. 2. Mod. 307. 3. Mod. 35. 2. Salk. 680. Comb. 92. 125. 133. 1. Show. 8. 2. Show. 319. 1. Lev. 54. 2. Lee, 7. Ld. Ray. 85. 91. 396. 730. 744. 752. 871. 1007. 1166. 1353. 1411. 8. Mod. 60. Stra. 728. 595. 633. 1043. 1229.

Here HOLT, *Chief Juſtice*, declared for law, that where a man is intereſted in the conſequence of that which he ſwears for, if it be that the doing of the act which he is now evidence to invalidate or ſet aſide was a means to obtain his liberty from impriſonment, or an exemption from corporal puniſhment, he ſhall be a witneſs, as in the caſe of *dureſs*, though it be to ſet aſide his own bond; yet it being given to obtain his liberty, he ſhall be a witneſs alſo, where the nature of the thing allows him no other evidence: As if a woman give a note or bond to a man, to procure her the love of *J. S.* by ſome ſpell or charm; in an indictment for the cheat, though it tend to avoid the note, yet ſhe ſhall be a witneſs (*b*).

NOTE, Here it could not be given in evidence, that the defendant was a *common uſurer*, becauſe he could not be ready to give an anſwer to that matter.

(*a*) 12. *Ann.* c. 16. See alſo Pollard *v.* Scholey, Cro. Eliz. 20. and 2. Hawk. P.C. 7th edit. 8vo. ch. 82. ſ. 15, &c. where all the caſes on this ſubject are collected.

(*b*) But ſee Abrahams *qui tam* Bunn, 4. Burr. 2251. Wallen *v.* Shelley, 1. Term Rep. 296. Maſters *v.* Drayton, 2. Term Rep. 496. and 4. Hawk. P. C. 7th edit. 8vo. ch. 46. ſ. 132 to 147.

HILARY

HILARY TERM,

The Firſt of Queen Anne,

IN

The Queen's Bench,

1702.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.* }
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.* }
Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

* Anonymous.

Caſe 166.

JUDGMENT IN DEBT UPON A BOND in the common pleas, is affirmed upon writ of error here, and a new writ of error brought in parliament.

If judgment in debt on bond be affirmed on error, and another writ of error brought, it is no *ſuperſedeas*, unleſs the plaintiff in error puts in bail.

Broderick moved for a *ſuperſedeas* of the execution without putting in bail; for before the ſtatute (*a*) in that behalf, the allowance of a writ of error was in itſelf a *ſuperſedeas*. And this caſe he ſaid was neither within the words or intent of the ſtatute; for when the judgment of the common pleas is affirmed here, there is no new judgment given here for the debt, but only the former judgment affirmed; and if this judgment ſhould be affirmed before THE LORDS, they do not award execution there, but command this Court to do it, and then the plaintiff will have the ſame advantage as he would have had if the judgment had not been before THE LORDS.

Poſt. 140.
Comb. 129. 199. 206. 211. 456.
1. Salk. 321.
3. Salk. 133.
6. Mod. 130.
Ld. Ray. 16. 47. 97. 405. 1295. 5. Burr. 2819.

(*a*) See 3. *Jac*, 1. c. 8. and the caſe of Hammond *v*. Webb, 10. Mod. 281.

HOLT,

ANONYMOUS.

HOLT, *Chief Juſtice*, ſaid, the recognizance entered into upon the allowance of the writ of error in the common pleas, goes only to that writ of error that is then brought; and it * [121] is true, if the judgment affirmed here be reverſed by THE LORDS, it will diſcharge that recognizance; but in caſe it be affirmed, here is a delay of execution, and coſts that the plaintiff is put to, and the recognizance of the common pleas does not reach them. If the Court ſhould erroneouſly affirm the judgment in the common pleas, not only the judgment of affirmation given by this Court, but likewiſe the original judgment of the common pleas would be reverſed by THE LORDS. And this being within the words of the ſtatute to entitle the plaintiff below to bail upon its removal up hither, when it is affirmed here, and a writ of error is brought before THE LORDS, that writ of error is not only of the judgment of affirmation given here, but likewiſe of the judgment given below; and the ſecurity given is that which makes the *ſuperſedeas* of the writ of error; for that ſtatute takes off the *ſuperſedeas*, if ſecurity be not put in; and there is no more reaſon to give ſecurity upon the firſt judgment than on the ſecond; and how can we take notice that there is a recognizance entered into in the common pleas, upon the firſt writ of error brought? For ſuppoſe it be not ſo, how ſhall we diſcover it? And we are not to preſume it; for it is not the duty of the Court to compel a ſecurity, but what they are to do, is to award execution if it be not done; but the not putting in bail does not hinder the progreſs of the writ of error, but it was only to hinder delay of execution; and if there be no precedents in this point, the reaſon is, becauſe of the rarity of the caſe.

Comb. 206. 229. 325. 456.

And THE WHOLE COURT inclined, that it was not a *ſuperſedeas* without bail:

But upon the importunity of BRODERICK, gave leave to ſpeak to it again (*a*).

(*a*) See Lane *v.* Bachus, that the Court will not ſet aſide an execution ſued out before, but executed after the allowance of a writ of error, ſerved on the ſheriff and the party, if the plaintiff in error has not regularly put in bail, 2. Term Rep. 44. See alſo 2. Term Rep. 183. 4. Term Rep. 436. that a writ of error is not a *ſuperſedeas*, where it is brought againſt good faith, or for the mere purpoſe of delay.—See alſo Smith *v.* Shepherd, 5. Term Rep. 9.

Caſe 167. Gravenor *againſt* Fenwick.

An affidavit to put off a trial for abſence of witneſs, muſt ſhew due diligence has been uſed.

AFFIDAVITS were made to put off a *trial at bar*, ſet down for the firſt *Tueſday* in Term, upon account of the witneſſes being not likely to be there.

DENIED, for that it was not ſworn that endeavours had been uſed in ſuch convenient time to have them, that without an unforeſeen accident they would be at the trial at the ſet time.

S. C. ante, 70. S. C. poſt. 156. S. C. Holt, 265. S. C. 1. Salk. 257. S. C. 2. Salk. 650. 8. Mod. 288. 1. Peer. Wms. 117. Stra. 691.

Anonymous.

Caſe 168.

PAGE came to the bar, to ſhew cauſe againſt *a prohibition* to a ſuit in the eccleſiaſtical court of *Ely*, for a church-rate, for repairing of the church and church-ornaments.

In a libel for a rate to repair a *church* and *ornaments*, if it is not ſaid how much is demanded for each, a prohibition ſhall go for the whole.

The * ſuit ſet forth, the church was out of repair, &c. and that at a meeting of the pariſhioners, a rate was made by a majority of them; that the plaintiff for the prohibition was an inhabitant, and rated ſo much. The ſuggeſtion was, that *J. S.* is ſeiſed in fee of the manor of *Dale*, within the pariſh; that he, and all thoſe whoſe eſtate he has in it, time out of mind uſed to repair an aiſle in the pariſh-church, and in conſideration thereof, were diſcharged of all rates for repairing the whole church, and that the defendant is tenant of part of the manor.

Ante, 69.
2. Lev. 102. 163. 186. 241.
1. Jones, 89.
1. Mod. 236.
2. Mod. 222.
1. Salk. 164.
Comb. 132. 298. 344.
Ld. Ray. 59.

First exception, That the libel is for repair of church and church-ornaments, and the preſcription goes only to the repair of the church.

Holt, *Chief Juſtice.* If you have not diſtinguiſhed how much is demanded for ornament, you have not libelled right; and the prohibition, if it goes at all, muſt go for all.

Second exception, The tendering of ſuch a plea below, and refuſal of it, is no cauſe of prohibition, but rather of appeal. *Vide* 1. *Bulſt.* 16.

Third exception, The preſcription is, that all the tenants of the manor were diſcharged, and he makes himſelf tenant of part.

Tenants of a manor exempted from repairing church.

Holt, *Chief Juſtice.* If the tenant of the whole manor has ſuch an exemption, a tenant in part ſhall have it in proportion.

Holt, *Chief Juſtice.* Though a man time out of mind repair a chapel, yet if it be not a predial chapel, having chapel-wardens belonging to it, yet it is not a reaſon to exempt it from a church-rate to repair (*a*); and here if he repair leſs than his proportion amounts to, it may be a queſtion, if it ought to diſcharge him? But if he repair more, or as much, it will be good: But this is not matter to be determined upon motion.

Ante, 69.

And the rule was made abſolute.

Holt, *Chief Juſtice.* Declare forthwith; for in prohibition, we may order the declaration to be delivered as we pleaſe in point of time.

(*a*) See 2. Inſt. 489. 2. Lev. 186. 289. pl. 50. 3. Mod. 264. 3. Burr. 1. Salk. 164. Hob. 66. 2. Roll. Abr. 1689.

Caſe 169. * The Queen *againſt* Taylor.

An indictment of forcible entry on the ſtatute 8. *Hen.* 6. c. 9. muſt alledge a *ſeiſin* in the perſon who is diſpoſſeſſed.

Ante, 115.
Poſt. 138.

1. Vent. 306.
1. Sid. 102.
1. Mod. 73.
Salk. 260.
2. Hawk. P. C. 41.

INDICTMENT OF FORCIBLE ENTRY upon the ſtatute of 8. *Hen.* 6. c. 9. without ſaying the party had been ſeiſed and diſſeiſed by force.

And it was quaſhed *niſi* before; and it was urged for cauſe, that that need not be expreſsly laid. *Vide Pop.* 205.

HOLT, *Chief Juſtice.* The caſe in *Popham* was upon the ſtatute of 21. *Jac.* c. 15. upon which it ſuffices to ſay, that that entry was made upon a copyholder or leſſee for years, and that he was expelled; but the preſent caſe is upon the ſtatute of *Henry the Sixth*, upon which you muſt always alledge a freehold and ſeiſin in ſomebody; and if it be an entry upon a leſſee for years, you muſt ſay, the entry was made into the freehold of *A.* in the poſſeſſion of *B.* and that ſo he diſſeiſed *A.*; and of neceſſity there muſt be a diſſeiſin of the freehold laid; and upon reſtitution the poſſeſſion is reſtored to the leſſee, and the freehold to the other; and on this ſtatute, *diſſeiſin* is a term of art, not to be ſupplied by any other word.

The rule was made abſolute by the whole Court.

Caſe 170. Parker *againſt* Collins.

Amendment.

Comb. 86. 133. 299.
3. Salk. 30, 31.
5. Mod. 17.
1. Salk. 47. 88.
2. Salk. 520.

THE *placita* were "of *Hilary Term* in the thirteenth year of "*William the Third,*" and the declaration of *Eaſter Term* againſt the defendant *in cuſtodiâ mariſchalli Mariſchalciæ dominæ reginæ.*

PER CURIAM. Let it be amended, for it is no part of the declaration, but only ſtyle of record.

There are four days to plead after demurrer.

AND THEY SAID, that after demurrer, the party has four days in Term to join or wave, and plead the general iſſue.

Comb. 19. Fitzg. 193. Ld. Ray. 68. 116. 8. Mod. 305. Tidd's Pract. 341.

Caſe 171. Stracy *againſt* Saunders.

The *payer* of money ſhall elect on what account.

A MAN owes money by bond, and alſo by award, ſuppoſe twenty pounds by each, and he pays one twenty pounds, it ſhall be upon which of both he pleaſes; for he, and not the receivers, is the firſt agent. *Quære (a).*

Comb. 397.
2. Vern. 105. 8. Mod. 236. 242. 3. Peer. Wms. 365.

(*a*) Anonymous, Cro. Eliz. 68. Colt *v.* Netterville, 2. Peer. Wms. 308. Heywood *v.* Lennox, 1. Vern. 24. Perris *v.* Roberts, 1. Vern. 34. Goddard *v.* Cox, 2. Stra. 1194. Bret *v.* Marſh, 1. Vern. 648.

* Pierce *against* Henriques. Case 172.

Michaelmas Term, 1. Anne, Rol. 45.

What shall be said a discontinuance.

ASSUMPSIT.—The declaration contained two counts; and "*non aſſumpſit*" was pleaded to one; and to the other, it being for one hundred pounds, was pleaded payment of ninety-nine pounds, which the plaintiff received; but nothing was pleaded to the reſt. The plaintiff replied, denying the payment. And after demurrer,

S. C. 2 Ld. [illegible]

PER CURIAM. The plea is well as to the ninety-nine pounds, for one may plead ſeveral pleas, as payment of part, and a releaſe as to the reſt, &c. And here it is *a diſcontinuance* (a); for he ſhould have taken judgment by *nihil dicit* for ſo much as had not been pleaded to, and have pleaded as to the reſt.

But IT WAS AGREED here, that the defendant could not plead "*non aſſumpſit*" in part, and *a releaſe* or *payment* to the reſt; for that would ſpoil the whole plea.

Being ſpoke to again, it was held to be a diſcontinuance *in toto*, PER CURIAM. And HOLT, *Chief Juſtice*, ſaid, it might be doubted, whether it could be ſo pleaded in an *indebitatus aſſumpſit*.

(a) See 3. Lev. 39. 55. Comb. 306. 323. 1. Salk. 4. 94. 179. 186. Ld. Ray. 691. 841. Stra. 302. 947.

Wood *againſt* Brauford. Case 173.

The record in dower may be amended by the pleadings below. S. C. ante, 104. 2 Salk. 270. 2. Saund. 212. 1. Mod. 47. 72. 256. 1. Lev. 181. 299. 2. Lev. 38. Ld. Ray. 232. 1005 1284. Fitzg. 1. 8, Mod. 25. Stra. 784. 1076.

DOWER. It appeared on record certified up, this being a writ of error, that the defendant, being *an infant*, had appeared by *attorney*; and this was aſſigned for error.

And after "*in nullo eſt erratum*" pleaded, and demurrer thereupon, it was ſuggeſted, that there was an admittance of *guardian* below, and a warrant for the receiving of the guardian.

PER CURIAM. If that be ſo, it is a good cauſe to amend the record; and as a precedent was quoted the caſe of *Waldegrave v. Lane*, in the fifth year of the late king and queen.

"*In nullo eſt erratum*" admits an *error in fact*. Yelv. 57. 1. Lev. 311. 2. Lev. 38. Cro. Jac. 521.

And PER CURIAM, After a good error in fact alledged, if the party will not join iſſue upon it, but pleads *in nullo eſt erratum*, he admits the fact to be true, and it is a good cauſe of demurrer.

Caſe 174. * Chambers *againſt* Jennings.

A *prohibition* lies to the court of "the conſtable "and marſhal" on a libel ſued there, for ſaying to *a knight*, "You "are a ſcandal "to the name "of *gentleman* "and to the *or-"der of knight-"hood.*"

DECLARATION on a prohibition to THE COURT OF THE EARL MARSHAL to ſtay a ſuit there againſt *Chambers*, ſetting forth, that *Jennings* is a gentleman born, and was dubbed *a knight* by *King Charles the Second*; that the plaintiff ſpoke theſe words to, and of him, "You a knight! You are a pitiful fellow, and an inconſiderable fellow, to the great ſcandal of gentlemen and of "the order of knighthood;" and likewiſe to the great provocation of *Jennings* to duel and breach of the peace.

It appeared on pleading, that the queſtions were,

S. C. 1. Salk. 553.
S C. Holt, 597.
Dyer, 285.
1. Show. 353.
Lutw. 1053.
1. Lev. 230.
4. Mod. 128.
1. Sid. 353.
1. Keb. 310.
3. Hawk. P. C. c. 4.
3. Bl. Com. 104.

FIRST, Whether there is ſuch A COURT OF HONOUR in *England*, as gives remedy for words not actionable at law, tending to the diſhonour of *knighthood*, or of anybody bearing arms?

SECONDLY, If THE COURT OF HONOUR have ſuch a juriſdiction, whether it ought not, in ſuch caſe, to be held before THE CONSTABLE and THE MARSHAL, and not before THE MARSHAL alone? And the ſtatute of *Richard the Second (a)* was likewiſe under conſideration.

IT WAS URGED *on the ſecond point*, that THE COURT OF HONOUR has been conſtantly held before THE EARL MARSHAL ever ſince the thirteenth year of *Henry the Eighth*, when the *Duke of Buckingham*, the then CONSTABLE, was attainted of high treaſon (*b*), except when A CONSTABLE was made *pro hac vice (c)*. And it was ſaid, that it did not follow from the authorities cited, that the court muſt be held before THE CONSTABLE and THE MARSHAL in all caſes (*d*). The earl marſhal is to ſee execution done, and yet he is one of the Judges of the court; and that is like moſt mayors courts, where the ſame perſon is both judicial and miniſterial officer. The way to recover fees for making *a knight*, is in *the marſhal's court* by 13 *Rich*. 2. c. 2. (*e*). The marſhal has power where the common law gives no remedy, as in point of precedency (*f*). And he quoted a caſe in that court in the twelfth year of *James the Firſt*, when there was no conſtable. As to the matter of arms, the court is held before the marſhal only (*g*); ſo in matter of honour (*h*). In the caſe of *Aſhton v. Jennings* (*i*) *[126] it was held, that matter of precedency belongs to the court of honour; and though all the ſtatutes that mention this court take notice of it, as held before THE CONSTABLE

(a) 13. *Rich*. 2. c. 2.

(b) 3. Hawk. P. C. 15.

(c) 4. Inſt. 124. 127. Forteſcue de Laud. 22. 32. 7 *Hen*. 4. pl. 14. Staund. P. C. 65. Co Lit. 74.

(d) Year Book 1. *Hen* 4. pl. . Roll. Abr. "Paten" Camden's Britannia, 193. 151.

(e) 1. Roll. Rep. 89.—See Duppa *v*. Gerrard, Stra. 78.

(f) 3. Bl. Com. 104.

(g) 1. Sid. 332. 1. Lev. 320.

(h) 2. Lev. 133.

(i) 2. Lev. 133.

Chambers *againſt* Jennings.

and THE MARSHAL, yet the reaſon of that is, that all the ſtatutes taking notice of it were made when there was A CONSTABLE and A MARSHAL; and THE CONSTABLE being the principal Judge, when there is one, there is great reaſon to name him; and if the court had been ſuſpended ſince the annexion of the office to the crown, there would be frequent application ever ſince for prohibitions, or complaints to parliament; for THE MARSHAL has exerciſed his juriſdiction ever ſince, and yet we find no ſuch complaint: and the famous caſe of *Sir Francis Michell* (*a*), deprived by authority of that court, was quoted, where ſome of the Judges of the common law had aſſiſted. There is no remedy but here or by duel. If any aſſume to himſelf the arms of another, or arms to which he has no right, he is puniſhable for the ſame in that court; *à pari*, if one revile a perſon who has right to bear arms, there ought to be remedy againſt him there; and if people find no remedy at law for ſuch words, they will have recourſe to the law of nature, and do themſelves right by the ſword; to prevent which, actions for words at common law have of late had much greater encouragement than uſual (*b*).

RAYMOND *contra*.

Show. P. C. 58.

FIRST, This is one of the general courts of the kingdom, of whoſe juriſdiction and original this Court will take notice. The juriſdiction of it is, indeed, ſomewhat dark, there being only *obiter* ſayings of it to be met with in the books; but the conſtant deſcription being, that it is held before THE CONSTABLE and THE MARSHAL, is a great argument that it is not to be held before any other (*c*). An appeal of matters out of the realm, is to be held before THE CONSTABLE and THE MARSHAL (*d*). It is agreed, that, in matter of life or member, they had no juriſdiction without A CONSTABLE; and what is the difference or the reaſon of it (*e*)? The ſtatute of 1. *Hen.* 4. c. 14. does not name them, as giving them a new juriſdiction. * The office of conſtable at firſt, was but a low one (*f*). In *France*, conſtables were the main leaders or generals of armies (*g*). The marſhal was an officer under the conſtable, as the groom of the ſtables (*h*); and his buſineſs was to ſuperviſe the other officers of the army (*i*).

* [127]

(*a*) 3. Hawk. P. C. ch. 4. ſ. 9.

(*b*) 4. Co. 20. 3. Lev. 330. Rol. title "Prohibition." 15. *Rich.* 2. Mem. 23. In the time of *King James the Firſt*, for calling a gentleman *a villain*, *February* 1617. Smith *v.* Gaddice, Ruſhworth's Collections, 1618. p. 2. ſ. 1055.

(*c*) The Year-Books 48. *Edw.* 3. pl. 3.; the Statutes 13. *Rich.* 2. c. 2.; the 1. *Hen.* 4. c. 14.; and Prynne on 4. Inſt. 62.

(*d*) Year-Book 13. *Hen.* 4. pl. 4. and 5; the 37. *Hen.* 6. pl. 3. Forteſcue, ch. 32. Spelman's Gloſſary, 146. Crompt. 92. Staunf. 71. Ruſhworth, 1640. 1066. Nalſon, 778. Co. Lit. 74.

(*e*) Ruſhworth, 2. part, 107.; and the caſe of Liſle *v.* Ramſay, Hutt. 3.

(*f*) See Lambard's Saxon Laws, "Heretook;" and 3. Hawk. P. C. c. 4. ſ. 1.

(*g*)

(*h*) See Spelman's Gloſſary, "Mare-"ſhall."

(*i*) 2. Ruſhworth's Coll. 1056.

CHAMBERS *againſt* JENNINGS.

Poſt. 128.
1. Lev. 107.

SECONDLY, They have not conuſance of words. A court of chivalry has no juriſdiction of words: beſides, they pretend only to conuſance of words not puniſhable at common law; and yet they ſay, the words in queſtion are provoking to duel; and a perſon is indictable or may be bound to good behaviour for words provoking to duel (*a*).

HOLT, *Chief Juſtice.* It was made an argument ſome years ago, that *a prohibition* would not lie out of this court to the court of honour, becauſe, as it was then ſaid, none ever was ſeen to have gone before; and they relied on the ſtatute of 13. *Rich.* 2. c. 2. which proves that if they ſhould encroach upon things not within their juriſdiction, there ſhould be *a writ* from THE PRIVY COUNCIL to reſtrain them. But notwithſtanding this it was adjudged, that in caſe of encroachments, *prohibitions* would lie, and it was the proper remedy; for it is the duty and buſineſs of this Court to reſtrain all manner of inferior juriſdictions, and to keep them within their bounds; and the ſaid ſtatute was made to give a farther remedy by privy-ſeal from the council; and the reaſon of that additional remedy was, that THOMAS *Earl of Gloceſter*, the then conſtable, was too great and powerful for the king's courts to deal with him; and beſides there could not be application to this Court in Vacation, when they proceed below; and ſo it was held by all the Judges.—Now the firſt matter here is, concerning the conſtitution of the court; and no doubt, formerly it was held before THE CONSTABLE and THE MARSHAL, and ſo all along until the thirteenth year of *Henry the Eighth*, when the then conſtable was attainted of treaſon. How then came it to be held before THE MARSHAL alone, and have you any precedent before that time, that it was held before THE MARSHAL alone? To make it out by preſcription, you cannot; for the firſt inſtance you give, is within time of memory, and no ancienter than the court of THE COUNCIL OF YORK, which obtained by encroachment only, for firſt it was but a commiſſion of *oyer* and *terminer*; yet it after drew in abundance of other matter, and all by the great *[128] * power of the preſident of the *North*. The court of requeſt was only by encroachment, and they acted like maſters in chancery, and held conuſance of matters of law, without any preſcription; and yet it fell at laſt of itſelf, without any act of parliament; their proceſs was a *ſubpœna*. And he ſaid, that he never knew what ſort of juriſdiction A COURT OF HONOUR has, as to matters ariſing within *England*; for the ſtatute of 13. *Rich.* 2. c. 2. gives them authority only of matters ariſing out of the realm, and feats of arms within the realm; by which they would have meant *coats of arms* and *eſcutcheons*. The miniſters of that court underſtand this matter of arms well, and give coats of arms and keep pedigrees of families; and if they find people that aſſume arms, to whom arms do not belong, or at leaſt that thoſe they aſſume belong not to them, their way is to poſt them up, by what juſtice or law I cannot tell.

(*a*) Hob. 62. 215. 252. Cro. Eliz. 58. 1. Lev. 55. Cro. Car. 498. Palm. 126. 2. Hawk. P. C. ch. 61. ſ. 3.

CHAMBERS *againſt* JENNINGS.

1. Salk. 200.

In this caſe, what ſatisfaction can they make to the plaintiff? If they fine the defendant, ſhall they enforce the payment of it by impriſonment? We have a very known maxim, that no court ſhall impriſon but a court of record; and THE COURT OF HONOUR is none. The High commiſſion court had aſſumed a ſtrange authority, more indeed than belonged to it, by the ſtatute of *Henry the Eighth* or of *Queen Elizabeth*; and they carried their power ſo far, by authority of great men of the clergy that were in the commiſſion, that it was hard dealing with them in WESTMINSTER-HALL; for that court aſſumed a power to impriſon, though they could not juſtify it. And he ſaid, it were to be wiſhed the parliament would give them juriſdiction of words tending to diſparage men of honour, and ſuch as generally provoke gentlemen to fight.

Ante, 127.

POWELL, *Juſtice.* If they have juriſdiction of words concerning COATS OF ARMS, that is not this caſe: but here you ſay the words tend to breach of peace, and are provoking to fight a duel; and if ſo they are indictable (*a*).

And now this Term it coming on in THE PAPER, and none appearing for the defendant,

THE COURT ſaid, that whatever colour there be to hold plea of ſome things before THE MARSHAL alone, there was no pretence to hold plea of words;

And ordered the rule for a *prohibition* to ſtand, and let them bring error in parliament if they will.

(*a*) See Burr. 316. 402.

*[129]

Caſe 175.

* Gery *againſt* Hopkins.

The *Eaſt India Company* is compellable to produce their *tranſfer books* in evidence.

S.C. 2. Ld. Ray. 851.

1. Salk. 281. 285.

2. Salk. 555.

UPON A MOTION of MR. RAYMOND, it was ordered, that the book of tranſfer of ſtocks, and other books of THE EAST INDIA COMPANY, might be produced at a trial to be had the next day at *Guildhall*, or that the parties might have copies of what part of them they pleaſed to give in evidence; it being a cauſe between parties having ſtock there, concerning which the action was brought (*a*).

And PER CURIAM, There is great reaſon for it, for they are books of a public company, and kept for public tranſactions, in

Yelv. 34. 3. Mod. 259. 5. Mod. 272. 2. Vern. 547. Ld. Ray. 253. 337. 927. 1446. 9. Mod. 66. Stra. 93. 162. 481. 304.

(*a*) They are not obliged to produce their private books of letters, Shelling *v.* Farmer, 1. Stra. 645. nor the private books relating to the appointment of their ſervants, Murray *v.* Thornhill, 2. Stra. 717. Nor can any perſon who has not an intereſt in them require them to be produced, Crew *v.* Saunders, 2. Stra. 1005. 1. Wilſ. 240. 1. Black. Rep. 40. See alſo Mayor of Lynn *v.* Denton, 1. Term Rep. 689.

which the public are concerned; and the books are the title of the buyers of ſtocks, by act of parliament.

And it was granted.

Caſe 176. Brown and his Wife *againſt* Gibbons.

In an action for *words* laid with a *ſpecial damage*, the plaintiff ſhall have *full coſts*, though the *words* are not actionable, and the damages under *forty ſhillings*.

S. C. 1. Salk. 206.
S.C. 2. Ld.Ray. 831.
8. Mod. 26. 78. 372.
Stra. 936.
3. Burr. 1688.
2. Bl.Rep. 1062.
Tidd's Pract. 646.

AN ACTION ON THE CASE was brought for words ſpoken of the wife of the plaintiff, *viz.* "*Mrs. Brown* is a whore," whereby the huſband loſt his cuſtomers; and a verdict, and under forty ſhillings damages.

The queſtion was, Whether there ſhould be more coſts than damages?

And it was ſaid, that this was not damages for the words, but for the conſequential damage; which, as was urged, was not within the ſtatute 22. & 23. *Car.* 2. c. 9.; and it was ſaid to have been adjudged, that in an action brought by a maſter, for a battery of his ſervant, he ſhall not be held lower in coſts by reaſon of the lowneſs of damages (*a*); and ſo it was ſaid to have been held in an action for ſlandering a man's title (*b*).

And THE COURT agreed to the diverſity, between an action for words actionable in themſelves (*c*), and an action for words actionable by reaſon of conſequential damages (*d*).

And here judgment was entered with a blank for coſts, which THE COURT were offended at, for it could not be filled after (*e*).

(*a*) Decided accordingly in Peak's Caſe, 3. Keb. 184.; for treſpaſs for beating a ſervant *per quod ſervitium amiſit* is not properly an action of aſſault and battery, but an action grounded on the ſpecial damage ſuſtained by the loſs of ſervice; and therefore, not being within the ſtatute. 22. & 23. *Car.* 2. c. 9. ſ. 136. the plaintiff is entitled to full coſts without a certificate. See alſo Anderſon *v.* Buckton, 1. Stra. 192. Batchelor *v.* Bigg, 2. Bl. Rep. 854. S. C. 3. Wilſ. 319.

(*b*) Law *v.* Harwood, Cro. Car. 141. Jones, 196. Palm. 529.

(*c*) Topſal *v.* Edwards, Cro. Car. 163. Philips *v.* Fiſh, 8. Mod. 371. Carter *v.* Fiſh, 1. Stra. 645. 2. Ld. Ray. 1589.

(*d*) Bury *v.* Perry, 2. Ld. Ray. 1589. Surman *v.* Shellito, 3. Burr. 1688. Baker *v.* Hearne, B. R. H. Collier *v.* Galliard, 2. Black. Rep. 1062.

(*e*) The Court held, that this action is not an action for ſlanderous words within the meaning of the ſtatute 21. *Jac.* 1. c. 16. ſ. 6. for the ſpecial damage is the *giſt* of the action, and therefore the plaintiff had *full coſts*, S. C. Ld. Ray. 831. See alſo Baſs *v.* Hickford, Andr 375. Mitchel *v.* Younghuſband, 2. Barnes, 135.

Caſe 177. The Queen *againſt* Whiſtler.

What ſhall be conſidered *aiding and aſſiſting* to the commiſſion of an offence.—S. C. 2. Salk. 542. S. C. 11. Mod. 25. S. C. Holt. 215. S. C. 2. Ld. Ray. 842. 1. Salk. 181. Ld. Ray. 584. 768. 791. 990. 1196. Stra. 44. 66. 1119. 4. Bl. Com 34. Foſter, 36;, 362.

ROLFE AND OTHERS were convicted ſummarily, upon the late act of 3. & 4. *Will. and Mary*, c. 10. againſt deer-ſtealing.

The Queen *againſt* Whiſtler.

The queſtion was, Whether the defendant was "unlawfully and unjuſtly aiding and aſſiſting the ſaid *Rolfe* in unlawfully and unjuſtly killing and hunting the ſaid deer, *viz.* by perſuading and meeting the ſaid *Rolfe*, &c. to hunt and * kill the ſaid deer; and lending them dogs to hunt and kill the ſaid deer, and horſes to carry them away, *contra formam ſtatuti*;" and, Whether *Whiſtler*, as charged, be within the ſtatute? * [130]

Gould, *Juſtice*, made two queſtions of the caſe:

First, Whether if the words "aiding and aſſiſting" were totally left out of the ſtatute, they would be guilty within the ſtatute?

Secondly, Whether in caſe they were not, theſe words would bring them in?

The words of the ſtatute are, "ſuch as are aiding and aſſiſting therein;" and he ſaid the word "therein" was the ſame there, with "thereof" or "thereunto;" for he who lent his dogs to hunt, is aiding in the hunting. And this appears from the preamble, which ſhews the cauſe of making the ſtatute; which is, "that notwithſtanding the many laws made againſt unlawful courſing and killing of deer, that foraſmuch as the penalties are not ſufficient to deter divers ſturdy and diſorderly perſons, who confederate together to commit theſe diſorders; and if any of them be found guilty, which is rare, they contribute and make the penalty light upon him that is ſo convicted; therefore for the more effectual diſcovery of ſuch perſons;"—What perſons? Such perſons as do confederate,—"be it enacted, &c." And the word "ſuch" couples the enacting part to the preamble (*a*). And here it would be very miſchievous, that the world ſhould know, that the ſtatute does not extend to acceſſaries before the fact; for then the rich would incite poor and deſperate fellows to hunt, and ſupply them with dogs, horſes, &c. and they would not be puniſhable within the ſtatute.—It is objected, that this is a penal law, and therefore to be conſtrued ſtrictly, and that "aiding and aſſiſting therein," muſt be in the very act of hunting. But I anſwer, Quite otherwiſe; for aiding and aſſiſting is properly before the act done (*b*). He who gives conſent or aid to a treſpaſs, is a principal treſpaſſer, and as much puniſhable as he who actually commits it. So is conſent to make clipt money high-treaſon, as much as the actual making (*c*). Under the word "aiding," come all thoſe who counſel, abet, plot, conſent, and encourage the fact, and are not preſent at the doing of it.

* **Secondly**, Suppoſe theſe words were not in the ſtatute, yet the defendant would be within it, for it is *a treſpaſs*; and I take it that there is no diverſity between the caſe of *treſpaſs* and *felony*, * [131]

(*a*) Cro. Jac. 15. Co. Lit. 372. and Alexander Poulter's Caſe, 11. Co. 30, 31.

(*b*) 12. Co. 81.

(*c*) See Sir E. Coke's Commentary on the ſtatute of Weſtminſter the Firſt, c. 14. 2. Inſt. 183.

THE QUEEN *againſt* WHISTLER. as to the aiding and aſſiſting, only that in the one they are principals, in the other acceſſaries only. And when an act of parliament makes a new law, and makes a crime *felony* that was not ſo before, though there be not a word of acceſſary, yet they ſhall be felons (*a*). Poſt 133. The caſe in the Year-Book of *Henry the Seventh* (*b*), upon the ſtatute *De Malefactoribus in Parcis* (*c*), he ſaid, could not be diſtinguiſhed from this caſe; that is a very penal law, for it inflicts three years impriſonment upon the party, and a fine to the king, and to find ſureties never to offend more, and for default of ſureties to abjure the kingdom, beſides a large amendment to the party aggrieved; and yet he that did only command was adjudged to incur the penalty: which caſe he affirmed to run *quatuor pedibus* with that now in queſtion.

POWYS, *Juſtice*. The conviction is good by virtue of the words "aiding and aſſiſting therein" in the ſtatute. The ſtatute *De Malefactoribus in Parcis* did not alter the offence, but left it a *treſpaſs* as it was before; and that ſtatute gave a complete remedy to the caſes to which it extended; but, it only extending to miſfeazance in ancient parks and parks of right, as appears by 2. *Inſt.* 199, there ſtill remained great defect of remedy, and no ſtatute againſt deer-ſtealing mentions aiders and aſſiſters, but that of *William & Mary*, which has the words now in queſtion, without which, *per Lui*, the defendant could not be convicted; and for the ſignification of the words "aiding and aſſiſting," he quoted *the Second Inſtitute* (*d*). Poſt. 132. Cro. Car. 340. The caſe of *Evans and Finch* (*e*) is grounded upon a ſtatute which has not the words "aiding and "aſſiſting" in it; and if they had, the perſon who ſtood upon the ladder would have been ouſted of his clergy. And he would make a difference between caſes of *felony* and *treſpaſs*; for acts of parliament taking away the benefit of clergy in felony, do not extend to aiders and aſſiſters before; but that, he ſaid, was in favour of life; but there is no reaſon for a ſtrict conſtruction in treſpaſs: and this ſtatute, he ſaid, was rather to be called a remedial than a penal law; and concluded that the conviction was good.

* [132] * POWELL, *Juſtice*, *accord*. It is objected that this is a penal law, and not annexed to the offence, but to the perſon offending under ſuch a deſcription, and the aiders and aſſiſters therein; and the diſtinction is taken between aiders and aſſiſters therein, and aiders and aſſiſters thereunto: He who only lends dogs, &c. to commit the fact, is not aiding *in* the fact, but *to* it; ſo ſuch perſon does not come within the deſcription of the ſtatute. He agreed that a man may be aiding to a felony, and preſent at the doing of it, but he affirmed that ſuch an aider would be a principal felon; but there may be likewiſe aiders that are abſent, which, in caſe of felony, would only be acceſſary; and upon this the diſtinction is grounded, that one ſort are aiders *therein*, and the other *thereunto*.

(*a*) Palm. 141.—See 4. Hawk. P. C. ch. 49. ſ. 13.

(*b*) 13. *Hen.* 7. pl. 12.

(*c*) 3. *Edw.* 1. c. 20.

(*d*) 2. Inſt. 182.

(*e*) Cro. Car. 473.

The ſecond objection is, that this is a penal law, and for that reaſon not to be carried beyond the letter of it, by conſtruction or equity; which he agreed. But he ſaid, that ſuch as lend dogs or horſes to hunt, are aiders in the hunting, as much as aiders to it, and as much as if they were preſent at it, becauſe the offence is treſpaſs, and all aiders to or in a treſpaſs are equally guilty of it, and all principals: So whoever perſuades a man to do a thing which is a treſpaſs, and that is proved in evidence, he ſhall be a principal treſpaſſer; or if the thing to which he perſuades be felony, he ſhall be acceſſary to it. And if a new felony be made by act of parliament, though there be not a word ſaid of him who perſuades to it, yet if he perſuaded before the fact, he ſhall be an acceſſary; if at the time, he ſhall be principal felon; if comforting, receiving, &c. after, he ſhall be acceſſary after. And he ſaid the diſtinction in the caſe of *Finch and Evans* was very nice; but however not like the preſent caſe, and he quoted the caſe of *W.* 2. c. 34. "If "a man raviſh a married or any other woman, he ſhall have judg- "ment of life and member," and what act can be more perſonal and penal than that? and yet aiders and aſſiſters are raviſhers within the ſtatute; even a woman who cannot commit the fact herſelf, ſhall be ſo. By the ſtatute of 3. *Hen.* 7. c. 4. for ſtealing of women, &c. all aiders and aſſiſters are principals by the ſtatute, yet there may be an acceſſary, as he who receives them (*a*), after knowing them to be guilty; and this by conſtruction of law. The ſtatute *De Malefactoribus in Parcis* is a penal ſtatute, and it is not annexed to any fact committed, but to all miſfeazors; *and yet aiders before the fact, are, by conſtruction, brought under it. The firſt action that I find brought upon that ſtatute, was in the twentieth year of *Edward the Third* (*b*): One broke into a park and reſcued his cattle, which was a treſpaſs, and by conſequence within the words of the ſtatute; and it was adjudged not within the meaning of it, and that the treſpaſs meant by the ſtatute was an unlawful hunting and killing of deer (*c*). In an action upon the ſame ſtatute and not guilty pleaded, the jury find that the defendant did break the park in order to chaſe, but killed no deer, the declaration being that he broke his park and killed his deer, and there he was adjudged to be a miſfeazor, and judgment was againſt him upon that penal ſtatute. The next caſe that I find in the books upon this ſtatute, is in the thirteenth year of *Henry the Seventh* (*d*), where it was adjudged that the defendant's inciting others to hunt, was a hunting in himſelf; and it is a very ſtrong caſe upon ſo penal a law as the ſtatute is. The ſtatute 1. *Hen.* 7. c. 5. (*e*) enacted, "That if any perſon in day-time, with vizor "upon his face, or paint or other diſguiſe, wrongfully chaſe in "the park of another, every ſuch perſon ſhall be puniſhed as a

Cro. Car. 340.

* [133]

(*a*) That is, he that receives the offenders alone, for ſuch as receive the offenders and the woman, are principals, by the very words of the ſtatute. —NOTE *to former edition.*

(*b*) See Year-Book 20. *Edw.* 3. pl. 11.

(*c*) Year Book 50. *Hen.* 5. pl. 10.

(*d*) Year-Book 13. *Hen.* 7. 12. & 13.

(*e*) 4. Reeves Hiſt. Eng. Law, 144.

“ felon :” ſo that it is not bound up to the offence itſelf, and there is a proviſo in that act to exempt, &c. And in caſe of felony, whether an offence be made felony, or the offender made a felon, they who perſuade, incite, &c. would be acceſſary to a felony, and why ſhall it not be ſo in caſe of a miſdemeanor too? And though the caſe of *Page and Harwood (a)* makes a diſtinction, where clergy is taken away from the offence, and where from the offender, under the circumſtances deſcribed by the ſtatute, as in the caſe of burglary, that where it is taken away from the offence, they that are aiding and aſſiſting in the offence ſhall loſe it, but where from the perſon offending ſo and ſo, he alone, and not the acceſſary, ſhall loſe it, that diverſity, he ſaid, and alſo the caſe of *Evans and Finch (b)*, were in favour of life. And in the caſe of *Evans and Finch*, if they both had got into the houſe, and one of them ſeeing the money had not touched it, but deſired the other to fetch it, would not they both loſe the clergy? The words of the ſtatute are, “ that he that enters and takes goods to the value “ of five ſhillings ſhall loſe the benefit of his clergy;” and he ſaid he could ſooner be reconciled to the caſe of *Page v. Haywood*, than to that of *Evans and Finch*. For upon the union of the two nations, THE SCOTS brought in the faſhion of daggers, and much miſchief aroſe betwixt THE ENGLISH and them, to avoid which *[134] the ſtatute of * Stabbing (*c*) was made. Suppoſe two men have a ſudden falling-out, and a ſtander-by give his dagger to one of them, and deſire him to ſtab him, which he does, and the man dies, I doubt whether they ſhall both loſe the clergy: And he concluded the conviction is good.

HOLT, *Chief Juſtice*, *contra*. I obſerve, that though my three brothers agree in one concluſion, they differ in the premiſes. GOULD ſays, that aiders and aſſiſters would be within the ſtatute, though there were no mention of them in it; POWYS ſays, it is merely becauſe of the expreſs words; and I differ from them both in the premiſes and in the concluſion. Everybody knows, that this being a penal law, ought by equity and reaſon to be conſtrued according to the letter of it, and no farther, though the fact that you would bring under it be within the reaſon, and as heinous or more than that which is expreſſed in it. That this act is penal is moſt plain, for here is a penalty of thirty pounds. SECONDLY, which is highly penal, The defendant is put to a ſummary trial different from MAGNA CHARTA, for it is a fundamental privilege of ENGLISHMEN to be tried by jury, which privilege has been ſecured to us by our anceſtors many hundred years ago. Then when there is a penalty inflicted, and a different manner of trial from MAGNA CHARTA inſtituted, and inſtead of being openly tried by his neighbours in a court of juſtice, he ſhall be convicted by a ſingle juſtice of peace in a private chamber, upon the

(*a*) Allen, 43. Styles, 86.

(*b*) Cro. Car. 340.

(*c*) 4. Bl. Com. 193.

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teſtimony of one witneſs, I fain would know if upon the conſideration of ſuch a law, we ought not to adhere to the letter of the law, without carrying words farther than the natural ſenſe of them? And let the preamble be what it will, and recite what it will, it is not enough to bring them under any penalty, if there be not words in the enacting part of the ſtatute to do it. It is objected, that becauſe "*confederacy*" is mentioned in the ſtatute, it ſhall take in ſuch as *perſuade* and *incite*, &c. But I anſwer no; but by reaſon thereof the penalty ſhall be greater upon the actual offenders, and their trial more ſevere; and I never heard of ſuch a rule, that becauſe the preamble of a ſtatute recites many particulars, and enacts a penalty only upon one of them, that the penalty ſhall be extended to all by conſtruction. Then the words of the ſtatute are "aiders "and * aſſiſters therein," that is, aiding and aſſiſting in the fact; * [135] and he who lends dogs and horſes to hunt, aids a man to hunt and kill, but he is not thereby aiding in the hunting and killing. The law makes a great difference in framing an indictment in a caſe, where one is preſent, abetting and aſſiſting, and where he is aiding and aſſiſting, but abſent at the time of the fact committed. If one be preſent, aiding and aſſiſting in caſe of felony, he is a principal; as if two fight, and one ſtand by one of them with his ſword drawn, he contributes to the actual killing; and that is what the law generally underſtands aiders and aſſiſters to be. If an act take away the benefit of clergy from one who does ſuch an act, and from aiders and aſſiſters, yet it ſhall not take away clergy from the acceſſary: And for this he quoted the caſe in *Dyer*, 186. where the difference is taken, between the manner of an indictment of an acceſſary before, that is by aiding and aſſiſting to the thing; and if it be after, that is for aiding and aſſiſting and comforting after the fact; and if preſent, where they are ſaid to be aiding and aſſiſting in the thing. But it is alſo objected, that this is *a treſpaſs*, and in treſpaſs all are principals. To this objection I anſwer, It is very true, if the ſtatute had inflicted this penalty under the name and denomination of *a treſpaſſer*, there all that ſhould be perſuading, commanding, or any way contributory before the fact, though abſent, would be within it. So if it were after, becauſe they are all by law treſpaſſers, and the puniſhment is laid upon *a treſpaſſer*, but not becauſe he is under ſuch and ſuch particular circumſtances; and ſo is the ſtatute *Of Malefactors in Parks*, for it lays the penalty, not becauſe they do miſchief in a park in ſuch a particular manner, but becauſe they are treſpaſſers there; and the words of the ſtatute are not, that ſuch and ſuch as do ſo and ſo, ſhall incur a penalty, as the words are in our caſe. If the words of the ſtatute *De Malefactoribus in Parcis* had been, that ſuch as did offend ſo and ſo, ſhould incur ſuch and ſuch a penalty, none would incur the penalty but ſuch as actually had chaſed: And our ſtatute now lays the penalty on one particular perſon, under this particular circumſtance, and not as he is a treſpaſſer at large, but as he offends under ſuch circumſtances. The caſe of *Evans and Finch* (a) is very ſtrong in the

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(a) Cro. Car. 474.

point: *Evans* went in at a window to a chamber in * the Inner Temple, and took forty pounds in money out of it, and all the while *Finch* was upon the ladder without-ſide, and in view of him who went in; and it was held, that he who ſtood upon the ladder ſhould have the benefit of the clergy upon the ſtatute of 39. *Eliz.* c. 15. There, no doubt, they both were principals in the fact; but becauſe clergy is only taken away by the ſtatute from ſuch as enter and take away, and *Finch* did not enter, he had his clergy: Yet if clergy had been taken away from any that committed burglary or houſe-breaking, there he ſhould not have it. For the ſtatute did not take away clergy upon account of the felony, but upon account of felony under theſe circumſtances of entering into the houſe and taking away: but in other caſes, clergy is taken away from the offence of which he is found guilty: as in caſe of robbery on the highway; there all that are robbers ſhall loſe their clergy; and one who goes to rob with another, though he ſtand at a diſtance from him and take nothing, yet he is a robber: But if clergy were taken away in this manner, that whoever ſhall meet a man on the highway, aſſault him ſo and ſo, and do rob him, ſhall loſe his clergy, in that caſe an abettor would not loſe his clergy, if he were not within ſuch a particular circumſtance, and ſtrictly within the deſcription. It is further objected, that in the caſe of *a rape*, whoever ſhall raviſh a woman ſhall loſe life and member, and that the benefit of clergy being taken away by the ſtatute, the abettor ſhall alſo loſe it, I anſwer, that the reaſon of it is plain, for there the act changing that which was *treſpaſs* before into *felony*, the very ſpecies of the offence is altered thereby; the abettors of that crime muſt be felons, becauſe they were guilty of that fact which is now felony; and the acceſſaries before and after ſhall be felons, becauſe they were aiding, inciting, &c. to a fact which is felony. Every man who procures a felony to be done, is a felon: ſo of a crime of a higher nature; as if an act of parliament had made a felony treaſon, they that ſhould be acceſſaries ſhall be now principals, becauſe the ſpecies of the offence is altered. And there is a vaſt difference between both caſes, for the one alters the nature of the offence, and the other only raiſes the penalty, when the offence is accompanied with ſuch and ſuch
* [137] circumſtances; and *per Lui* they who are procurers of a * fact, cannot be called aiders and aſſiſters in it, but may be ſaid to be aiding and aſſiſting to it. My brothers have not quoted one caſe that warrants their concluſion. And he ſaid, that he had known the caſe of *Evans and Finch* enquired into, and ſcanned ſince; and that he himſelf had ordered the record to be brought to him, and that judgment is as it is reported by *Croke*. It was an eaſy anſwer, he ſaid, to a caſe, to ſay that it was a nice one, but he ſaid the authority of it was never impeached, and if it had been in treſpaſs, he who ſtood upon the ladder would have been a principal; but when the act took away clergy under ſuch a particular deſcription and circumſtances, it was quite otherwiſe.

He

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He ſaid, the caſe of *Page and Harwood* agreed in point with the reaſon of this; and if two quarrel, and a third perſon is the incendiary and put them on, and ſo in truth is the worſt of the three, and one of the two ſtab the other, he who ſtabs ſhall loſe his clergy, and he that ſet him on ſhall not; and the reaſon is, becauſe one is within the deſcription of the ſtatute, and the other not; for clergy is not taken away from *the offence of manſlaughter*, but from *the perſon* committing *manſlaughter* ſo and ſo; yet in truth, he that encourages the other to ſtab, in conſideration of law is as much guilty as the other of the manſlaughter. The ſtatute *Of Malefactors in Parks* deſcribes the offence as a common treſpaſs, and raiſes the penalty upon ſuch common treſpaſs done in a park; but here the ſtatute raiſes the penalty upon a perſon who ſhall, in a park where deer are uſually kept, &c.; and therefore this being not within the letter of the act, ought not to be brought within the equity of it. And he concluded that the conviction ought to be quaſhed.

But the Court was againſt him *(a)*.

(*a*) See the caſe of Rex *v*. John Royce, 4. Burr. 2073. and the caſe of Midwinter *v*. Sims, in the Appendix to the third edit. of Foſter's Crown Law, 415.

Anonymous.

Caſe 178.

Prohibition.
Tithes of wood.
Poſt. 148.

UPON a motion for a prohibition to a ſuit in ſpiritual court for tithe-wood:

6. Mod. 252.
1. Show. 158. 172.
Ld. Ray. 137. 835. 991.

Holt, *Chief Juſtice*. One may preſcribe in a *non decimando* of wood; or it is a good plea that it is for boughs, lopping, germs, &c. of timber-trees of twenty years ſtanding; and if that plea be denied below, it is good cauſe of prohibition; but if they receive and traverſe it, they may try it here.

Anonymous.

Caſe 179.

A prohibition may iſſue at any time.

HOLT, *Chief Juſtice*. You never are too late for a prohibition after ſentence *(a)* in any caſe but one, and that is, where the ſuit is out of the dioceſe, upon the ſtatute 23. *Hen*. 8. c. 9. becauſe by pleading you own their juriſdiction *(b)*.

(*a*) See 2. Inſt. 602. 619. 3. Mod. 286. Salk. 548. 2. Burr. 813. Dougl. 378. Cowp. 424. 1. Term Rep. 552. 2. Term Rep. 473.

(*b*) See Cro. Car. 27. 1. Vent. 61. 2. Show. 155. 6. Com. Dig. "Prohibition" (F. 9.).

Caſe 185.

* Anonymous.

A *mandamus* will not lie to grant adminiſtration to a particular perſon. Ante, 37. 83. 118. Poſt. 143.

MULSO moved for a *mandamus* to commit adminiſtration to *J. S.*

CURIA. We cannot do that; but we may to grant adminiſtration to *J. S.* or *next-a-kin* according to the ſtatute (*a*).

Ld. Raym. 262. Comy. 96.

(*a*) See Steward *v.* Eddy, poſt. 143. 1. Stra. 530. 2. Stra. 992. 1. Wilſ. 21. 126. 138. 4. Burr. 1991. 1. Term Rep. 374.

Caſe 186.

The Caſe of Courtney, an Attorney.

"A writ of error pending" may be pleaded to an action of debt on the judgment. Ante, 62. 121.

5. Mod. 68. 1. Mod. 79. 4. Mod. 314. Comb. 199. 206. 229. 456. Yelv. 157. Hob. 72. 6. Mod. 130. 1. Salk. 321. 3. Salk. 133. 2. Mod. 28. 45. 206. 112. 185. 8. Mod. 129. 1. Peer. Wms. 351. Stra. 632. 867. Ld. Ray. 47. 405. 1179. 1295.

DEBT was brought upon a judgment in the common pleas pending *a writ of error*, and that matter pleaded in *abatement.*

HOLT, *Chief Juſtice.* It is hard that a *writ of error* ſhould ſuperſede execution upon a judgment (*a*), and not ſuperſede an action to be brought thereupon; for if there be a judgment againſt a teſtator who is alſo bound in A STATUTE, the executor may bring a writ of error and pay THE STATUTE, notwithſtanding the judgment be afterwards affirmed (*b*).

POWELL, *Juſtice.* It has been held in THE EXCHEQUER-CHAMBER not to be a good plea, becauſe it is upon another original, and a collateral matter; but that the Court would ſhew all manner of diſcountenance of it, and therefore would not hold the party to bail.

HOLT, *Chief Juſtice.* Though it be a new original, yet it is no collateral matter, but the judgment on which the writ of error is brought is the *gist* of the action. And as to the caſe in THE EXCHEQUER-CHAMBER, he ſaid, that he had ſpoke to TREBY, *Chief Juſtice*, about it, and that he had informed him it had gone off upon another matter, *viz.* that the concluſion of the plea was ill, for it was "*petit judicium ſi* the party *reſponderi debeat* till "judgment affirmed," and not *pet. jud. de billâ* or *brevi.* And the caſe of *King v. Tuke* (*c*) was remembered, where it had been held a good plea in abatement.

THE COURT gave no opinion (*d*).

(*a*) See Jaques *v.* Nixon, 1. Term Rep. 280. and Doe *v.* Bracebridge, 1. Term Rep. 2. *notis.*—See alſo 3. Term Rep 643. 4 Burr. 2454.

(*b*) Bearblock *v.* Read, Cro. Eliz. 822. S. C. Yelv. 29. S. C. 2. Brownl. 39. S. C. Godolphin, 219. S. C. Co. Ent. 152.

(*c*) Ante, 12.

(*d*) See Syms *v.* Tims, 1 Show. 98. Rottenheffer *v.* Lenthall, 1. Show. 146. Deighton *v.* Glanvil, 4. Mod. 248. that "a writ of error pending" cannot be pleaded in *abatement* of an action of debt on a judgment: but the Court, under circumſtances, ſtay the proceedings in the action until the writ of error is determined, Taſſwell *v.* Storey, 4. Burr. 2454. Grebb *v.* Abbot, Cowp. 72. Entwiſtle *v.* Shepherd, 2. Term Rep. 78. Chriſtie *v.* Richardſon, 3. Term Rep. 78. Kempland *v.* Macauley, 4. Term Rep. 436.

Anonymous. Caſe 187.

PER CURIAM. Till bail put in, one is not in court to move to bring in principal, intereſt, and coſts (*a*).

Principal, intereſt, and coſts. Ante, 114. 6. Mod. 11.

(*a*) See 4. & 5. *Anne*, c. 16.

* [141]

* Anonymous. Caſe 188.

HOLT, *Chief Juſtice.* I never knew money brought into court, and it ſtruck out of the declaration in *debt*, though it has been done upon a bond with condition, in debt for rent, and in a *mutuatus eſt*; and he ſaid, that he had known it done in *replevin*, the diſtreſs being for rent (*a*); and that the firſt motion ever made for bringing money into court upon a *mutuatus* had been done by *Levinz*, in KEELING's time.

In debt upon articles, money cannot be brought into court. 8. Mod. 176. 236. 305. Stra. 576. 638. 787. 822. 890. 1191. 1217.

NOTE, Here it was debt upon articles (*b*).

(*a*) See Walnough *v.* Houghton, 2. Barn. 229. Fulwell *v.* Hall, 2. Black. 837.

(*b*) But this is now provided for by the ſtatute 4. & 5. *Anne*, c. 16.—See Tidd's Practice, 289. 410.

Blainfield *againſt* March. Caſe 189.

A SEAMAN died in the voyage; and the captain, according to the uſage among them upon ſuch occaſions, took all his goods and ſold them at THE MAST, and made an inventory of them, and of the rates he ſold them at, and delivered it to the adminiſtratrix at his return.

The adminiſtratrix brought an action of trover for the things juſt as they were mentioned in the inventory, and recovered juſt the value for which they were ſold in damages.

Quære, If the inventory and ſale of a dead ſeaman's property at THE MAST is concluſive evidence of their value, or the practice of *maſt-ſelling* legal.

But HOLT, *Chief Juſtice*, held, at the trial of this cauſe at *Guildhall*, this uſage of ſelling the goods of dead ſeamen at the maſt to be void.

The plaintiff declared of a poſſeſſion of the inteſtate, and of a loſs by him in hi ſlife-time, and laid the converſion to be in his own time; and the defendant pleaded not guilty.

BRANTHWAITE *for the defendant* offered to give in evidence, that there was an executor alive, and ſo the property out of the plaintiff by the will.

HOLT, *Chief Juſtice*, held, that, this being trover upon the poſſeſſion of *the inteſtate*, and *not guilty* pleaded, the defendant could not give in evidence a will made, and executors appointed, but that it ought to have been pleaded *in abatement*: but if trover

In trover by an adminiſtrator on the poſſeſſion of the inteſtate, it cannot, on the general iſſue, be given in evidence, that the deceaſed made a will, and that the executor is living.

S.C. 2. Ld. Ray. 824. S. C. 1. Salk. 285. S. C. Holt, 44. 2. Salk. 654. Ld Ray. 191. 991. 1219. 1529. 8. Med. 120. Stra. 60. 128.

BLAINFIELD *againſt* MARCH.

had been on the poſſeſſion of *the adminiſtrator*, there, upon *not guilty*, he might take advantage of that matter in evidence. And if an executor bring trover upon the poſſeſſion of his teſtator, upon not guilty, he ſhall not be put to prove himſelf executor; but otherwiſe, if he had brought it upon his own poſſeſſion.

Trover for twelve *thecis de ſpirit.* with a daſh, and fifty gallons *aquæ callidæ*, ANGLICE "hot "waters," is good.

One *item* in the declaration was, that the inteſtate had been poſſeſſed of "*duodecim dimid. thecis de ſpirits*, with *a daſh* as here, ANGLICE "twelve half caſes of ſpirits;" AND ALSO fifty gallons *aquæ callidæ*, ANGLICE "hot waters."

BRANTHWAITE *in arreſt of judgment* moved,

5. Med. 181. 324.
1. Lev. 48.
1. Sid. 60. 98.
2. Lutw. 1489.
Comb. 306.
1. Ld. Ray. 20.

FIRST, That it is uncertain what is meant by "*caſes*."

SECONDLY, That the quantity ought to appear.

THIRDLY, That *ſpirits* is of an uncertain ſenſe.

FOURTHLY, That it ought to have been put into *Latin*, ſince it has a *Latin* word, or with a framed word and AN ANGLICE (*a*); for if words be ſo uncertainly laid that it is not known what is meant by them, it is ill; but if they be inſenſible words, no damages *[142] ſhall * be intended to be given for them.

And this was agreed to by THE COURT.

And THEY ALL HELD, that trover will lie for "*a caſe*" or "*a tub*," becauſe it is an individual thing; but if one bring trover for "a tub of water" or "a tub of beer," without ſhewing how much it contains, they inclined that it was uncertain, though it ſhall be underſtood to be for the tub and the beer; but it was agreed, it would lie for "a trunk of linen," for "a library of "books," &c.

MOUNTAGUE *contra*. In the caſe of *Herbert v. Lane* (*b*), an action of trover was brought by a carrier for "a trunk of linen" and other matters; and it was held good after verdict. An action for burning the defendant's barn, *per quod* he loſt ſeveral goods, *et quædam ornamenta pro equis*, has been held good after verdict (*c*). In *Ventris* (*d*) there is the rule before put, that if words be inſenſible, damages are not given for them; and if they have any certain ſenſe, then it will be well. He ſaid, "a caſe of brandy" or "a caſe of ſpirits" was as well known among ſeamen as "a "hundred of fruit" or "a bottle of wine" among others. Trover for "goods to the value of three hundred pounds" is good (*e*); for "two *plancis granarii*," ANGLICE "planks of a granary," has been held good, becauſe confined to a certain uſe and place (*f*). So alſo for "a library of books," without ſaying how many or what books (*g*). It is good for "a piece of brandy (*h*);" for

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(*a*) See 4. *Geo.* 2. c. 26. and 6. *Geo.* 2. c. 14.

(*b*) Stiles, 370.

(*c*) 1. Keb. 825.

(*d*) 1. Vent. 17.

(*e*) 2. Roll. Rep. 154.

(*f*) 1. Sid. 98.

(*g*) Stiles, 338.

(*h*) 1. Lev. 303.

" quidam

" *quâdam parcell. fili (a).*" So alſo for " *decem paribus tegulorum* **Blainfield** *againſt* **March.**
" *et veltrum,*" ANGLICE " curtains and vallance (*b*)." So alſo " *de tribus ſtruib. fœni,*" ANGLICE " three cocks of hay (*c*);" " *de duoden. fili,*" ANGLICE " a dozen of thread (*d*);" " *de uno* " *meſſuagiò,*" ANGLICE " the ſign of the *Croſs Keys* (*e*)." So alſo " *de uno plumbo, &c.*;" and " for a ſack of corn (*f*)."

Holt, *Chief Juſtice.* One may have trover for " a piece," 1. Salk. 219.
though ſome pieces be larger than others; and " a library of 2. Salk. 654.
" books" is eaſily aſcertained by the place they are in, and aſking Comb. 306.
what they are worth in the whole (*g*). And he put the caſe of trover of ſo many " *ralis et palis,*" ANGLICE " rails and " pales (*h*)."

And though here the word " *gallon*" was ſaid to have a certain *Latin* name, that is " *congius,*" yet Holt, *Chief Juſtice*, ſaid, our gallon is not the ſame with that of THE ROMANS.

The caſe being moved at another day upon the word " ſpirits," which was ſaid was *Engliſh*; whereas by the ſtatute of *Henry the Sixth* (*i*) all pleadings are to be in *Latin*; THE COURT held, that " a caſe of ſpirits" was certain enough, and that " ſpirits" with *a daſh* might be well * taken for " *ſpiritibus*;" and there is the * [143]
word *galo galonis*, or *galona galonæ*, to be met with in *Spelman* for an *Engliſh* meaſure, containing eight pints, called a gallon.

And PER TOTAM CURIAM, the plaintiff had judgment.

(*a*) 2. Saund. 74.
(*b*) 1. Lev. 301. 1. Sid. 445. 2. Sid. 174.
(*c*) 1. Keb. 237.
(*d*) 1. Lev. 48.
(*e*) Stiles, 419.
(*f*) Wood *v.* Smith, Cro. Jac.
(*g*) Ld. Raym. 588.
(*h*) See 1. Com. Dig. 317.
(*i*) See 3. Bl. Com. 322.

Steward *againſt* Eddy.

Caſe 190.

MANDAMUS to grant *adminiſtration* to the wife of the **Mandamus** for an admini-
inteſtate or next of kin. ſtration.

And it was ſhewed, that there was a will pretended below, and Ante, 140.
adjudged no will; and an appeal of that ſentence. 1. Lev. 18.

And PER CURIAM, The appeal being a ſuſpenſion thereof, Ld. Ray. 262.
the rule for the *mandamus* was diſcharged (*a*). 1. Pr. Wms. 57. 3. Pr. Wms. 337 Stra. 892. 91.

(*a*) See Anonymous, ante, 140. Ray. 235. 1. Sid. 281. 372. 1. Lev. 187.—See alſo Anonymous, Stra. 552. Rex *v.* Dr. Hay, 1. Black. Rep. 640. Lovegrove *v.* Bethel, 1. Black. Rep. 668.

Booth *againſt* Johnſon.

Caſe 191.

ENGLAND, } THE lord *William the Third*, late *King of Eng-* Writ of error.
to wit. } *land*, &c. ſent to his right truſty and well-beloved *Thomas Trevor*, *Knt.* his chief juſtice of the bench, his writ cloſe in theſe words (to wit), *William the Third*, by the

grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to his right truſty and well-beloved *Thomas Trevor*, *Knt.* his Chief Juſtice of the Bench, greeting: Becauſe in the record and proceſs, and alſo in the giving of judgment of a plaint which was in our court before *Edward Nevill*, *Knt.* and his companions, then our Juſtices of the bench aforeſaid, by our writ, between *Thomas Johnſon* and *Mary* his wife, adminiſtratrix of the goods and chattels which were *Sylvanus Rowley's*, gentleman, who died inteſtate, as it is ſaid; and *Anne Booth*, late of *Weſtminſter*, in the county of *Middleſex*, widow, of a plea of treſpaſs upon the caſe, as it is ſaid, manifeſt error hath intervened, to the great damage of her the ſaid *Anne*, as we have received from her complaint: We, willing that the error (if any there ſhall have been) to be corrected in due manner, and complete and ſpeedy juſtice to be done to the parties aforeſaid in this behalf, command you, that if judgment thereof be given, then that you ſend the record and proceſs aforeſaid, with all things touching the ſame, to us, under your ſeal, diſtinctly and openly, and this writ, ſo that we have them from the day of *Saint Michael* in three weeks, whereſoever we ſhall then be in *England*, that the ſaid record and proceſs being inſpected, we may further do thereupon for the correcting the error, that which of right, and according to the law and cuſtom of our realm of *England*, ought to be done. Witneſs, *Thomas*, *Archbiſhop of Canterbury*, and the reſt of the guardians and juſtices of the kingdom, at *Weſtminſter*, the eighth day of *July*, in the thirteenth year of our reign. LAYTON.

Caſe 192.

Booth *againſt* Johnſon.

A declaration in *aſſumpſit*, alledging, that the defendant, in conſideration the plaintiff would receive ſuch children into his houſe as *gueſts*, and find them neceſſaries, promiſed to pay, and averring that he did receive them into his houſe, and found them *neceſſaries*, is good, without ſaying he received them as *gueſts*.

ASSUMPSIT. The plaintiff declared, that in conſideration the plaintiff's teſtator did, at the requeſt of the defendant, receive as *gueſts* into his houſe ſuch children, and find them neceſſaries, he the defendant promiſed to pay the plaintiff's teſtator what it ſhould come to.

The defendant pleaded the ſtatute of Limitation ill.

The plaintiff demurred, and had judgment in common pleas:

And a writ of error thereof was brought here, and common error aſſigned.

BRODFRICK *for the plaintiff* in error. The agreement was to receive ſuch children, *ut hoſpites*, into the teſtator's houſe, and to find them neceſſaries; and the averment is, that he received them into the houſe and found them neceſſaries, without ſaying that he had received them *ut hoſpites*, and the law annexes ſeveral ſubſtantial privileges to the condition of an *hoſpes*; ſo that to receive one generally into a houſe and to find him neceſſaries is very different from receiving him as *hoſpes*, and therefore the agreement is

S. C. 2. Ld. Ray. 838. S. C. 3. Ld. Ray. 7. S. C Lilly Ent. 471. S. C. Salk. 25. Ante, 87. Ld. Ray. 152. 715. 735. Fitzg. 302. Stra. 552.

BOOTH *againſt* JOHNSON.

not purſued. A *gueſt* is a diſtinct thing from ſervants, apprentices, &c.; and yet, as it is averred here, it might be, that they were received as ſervants or apprentices; and where one declares upon an expreſs agreement, he muſt bring himſelf expreſsly within it. The caſes in 2. *Leo.* 53. 72. 1. *Saund.* 6, 7. 1. *Sid* 309. *Yelv.* 87. 175. 2. *Cro.* 245. *Jones*, 441. are all upon variances from the agreement.

PARKER *contra* quoted *Dr. Cleland's Caſe* (*a*), where the plaintiff declared, that the defendant, in conſideration that he would do all his *commands honeſtly* and truly for the ſpace of a year, promiſed to pay to the plaintiff ten pounds, and that he had done all his *honeſt commands*; and after a verdict for the plaintiff, it was aſſigned for error, that the promiſe was, that he ſhould do all his *commands honeſtly*, but that the declaration was, that he had done all his *honeſt commands*, and that he might have done his honeſt commands, but not done them honeſtly, yet the declaration was held good.

* HOLT, *Chief Juſtice.* None of your caſes come up to the caſe in queſtion; for the caſe of *Hargrave v. Rogers* (*b*) was thus: *A.* bound himſelf in a bond, with a condition, that a third perſon ſhould appear to an action upon eight days warning, and that, if he were condemned, he would anſwer the condemnation; the third perſon appeared in an action without eight days notice, and was condemned; that ſhall not forfeit *A.*'s bond; for he being a third perſon, cannot do an act to alter the terms of *A.*'s agreement: as if *A.* be bound to *B.* to pay him a hundred pounds, *B.* may take any collateral ſatisfaction for it; but if the condition were to pay *C.* a hundred pounds, there *C.* ſhall not receive any collateral ſatisfaction to ſave the bond; for he cannot alter the terms of an agreement made between ſtrangers. And as to *Leate's Caſe* (*c*), the conſideration is, that the plaintiff ſhall procure *J. S.* to renounce adminiſtration; ſo there is an act to be done by *J. S.* to entitle himſelf to an action; for if he do nothing, though the other renounces adminiſtration, he has no cauſe of action; for the agreement was not to pay ſo much money if the other renounced adminiſtration generally, but if *J. S.* procured him to do it; ſo that caſe quite differs from this. And as to the *Caſe of St. Catherine's Hoſpital*, which you quote out of *Leonard* (*d*), the agreement muſt have been thus: In conſideration that *A.* at the ſpecial inſtance and requeſt of *B.* would build a houſe for *B.* that then *B.* would pay him ſo much money for it, and in his declaration he ſays, that he did build the houſe, but does not ſay he did it at the requeſt of *B.*; and he needed not to do it, for the agreement was not, that he ſhould build a houſe when the defendant did requeſt him, but the agreement was abſolute to build a houſe; and to that agreement he was brought at the requeſt of the defendant;

6. Mod. 227. 259.

(*a*) Poph. 193.

(*b*) Cro. Jac. 45. Yelv. 52.

(*c*) W. Jones, 441.

(*d*) 2. Leon. 52.—See alſo Elſee *v.* Gateward, 5. Term Rep. 143.

Booth *againſt* Johnson.

fendant; and he quoted the caſe of *Berrisford v. Woodroffe* (*a*), and the caſe of *Pointer v. Pointer* (*b*), in conſideration that the plaintiff, at the requeſt of the defendant, would marry the defendant's daughter, he promiſed to give him ſo much money, and the plaintiff in his declaration avers, that he did marry her, without ſaying, that it was at the requeſt of the defendant, and held to be well in itſelf, without any requeſt, or help of a verdict. And he put a caſe where the agreement was, that the plaintiff ſhould put 6. Mod. 227. his ſon as an apprentice to the defendant for ſeven years, and that the defendant ſhould find him meat, drink, and clothes, and the * [145] plaintiff brought his action againſt the defendant, * without averring he had put his ſon to him for ſeven years, and held, that the action did not lie; for there it was part of the agreement, that he ſhould put his ſon to him, and the defendant was not to provide for him if he had not been put to him as an apprentice for ſeven years (*c*). The caſe of *Rock v. Rock* (*d*) was, he ſaid, againſt all reaſon, and if the very caſe in terms were to be judged over again, he would be of a contrary opinion to it; for it was to pay ſo much money before the plaintiff did take his next journey to *London*; and the exception taken was, that the plaintiff had not averred that the journey mentioned in the declaration was the defendant's next journey after the agreement; for if it were the next, then, by their own confeſſion, the action lay; and if it were not the next, then there was another journey before, and then too the action well brought. And he put the caſe of *Tate v. Lewen* (*e*), in conſideration that the plaintiff's inteſtate, at the requeſt of the defendant, did find him *diverſa veſtimenta et omnia materialia adindè ſpectant.* he promiſed to pay him all that he ſhould reaſonably deſerve for the ſame, and the plaintiff brings an action, and avers, that he did find *diverſa veſtimenta et neceſſaria præd.* and not a word mentioned of *neceſſaries* before, but only *materialia*, and that he deſerved ſo much for them, yet it was held good; and this was upon a judgment by default moved in arreſt of judgment, upon a return of a writ of enquiry of damages. In the caſe of *Johnſon v. Abington*, in *Stiles* (*f*), which is the beſt reported caſe in the whole book, for it is plainly and ſenſibly reported, the agreement was, that in conſideration the plaintiff would deliver to the defendant's ſon ſo much ware as he ſhould deſire, the defendant promiſed to pay what they ſhould be worth, and the plaintiff avers in his declaration, that he did deliver ſuch goods to the defendant's ſon, which were received by him, without ſaying it was at his deſire; and that was held good, without any requeſt, or help of a verdict; for the acceptance of the ſon is tantamount to a deſire, though he never did deſire him. So here is an agreement, that in conſideration that the plaintiff would take into his houſe the defendant's children to be his gueſts, the defendant would pay him for their diet what it ſhould be worth; and the breach aſſigned is, that he

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(*a*) Cro. Jac. 404.

(*b*) Cro. Car. 194.

(*c*) 3. Salk. 586.

(*d*) Yelv. 175.

(*e*) 2. Saund. 374.

(*f*) Stiles, 163.

did take them into his houſe, and did diet them, &c. without ſaying that they were as *hoſpites*; but ſurely the thing ſpeaks itſelf, and they ſhall be intended to be as *gueſts*, if the contrary do not appear on the other ſide. And if the word *hoſpes* had not at all been in the agreement, * it would be intended, *prima facie*, that he was to * [146] receive them as *gueſts*, yet upon the evidence that he agreed to take them into his houſe, and find them meat and drink, he could not be nonſuited; and the averment is full and complete as can be; and it would be a very foreign intendment to take them to be *ſervants* or *apprentices*, or other than *gueſts*; and if ſuch a thing were, it ought to have come on the other ſide.

Powell, *Juſtice.* In this very caſe it was held, in the court of common pleas, that to take one into his houſe, and find him with neceſſaries, was to receive him as *a gueſt*, as much as if it had been ſo expreſſed, for the words import ſo much; and if it were not ſo, the defendant ſhould have come with a *bene et verum eſt*, and confeſſed the receiving and finding neceſſaries, but alledging that they were there as *ſervants*, *&c.*

And the judgment affirmed PER TOTAM CURIAM.

Sir Richard Rains *againſt* the Commiſſary of the Dioceſe of Canterbury.

Caſe 193.

ROGERS, a ſeaman, died beyond ſea: the place of his habitation, while in *England*, was *Sandwich*, within the dioceſe of *Canterbury*, and he had *bona notabilia* in other dioceſes within the province of *Canterbury*.

The right of granting adminiſtration may be tried in an *indebitatus aſſumpſit* for the fees.

The commiſſary of the dioceſe commits adminiſtration to the wife, and a creditor of the inteſtate is ſet up in THE PREROGATIVE-COURT to cite in the woman to have her adminiſtration repealed.

To this ſuit *a prohibition* was moved for, and a rule *niſi* today.

And now the Judge of the prerogative-court alledging that this was in derogation of his juriſdiction, which he deſired to maintain; and it appearing on the very ſuggeſtion that there were *bona notabilia*; IT WAS URGED, that that was a confeſſion that the adminiſtration committed by him was void, and none ought to be prohibited to repeal a void adminiſtration.

1. Roll. Abr. 408.
1. Lev. 78.
2. Lev. 86.
3. Mod. 324.
3. Salk. 70. 164.
Fitzg. 303.
Ld. Ray. 86. 265. 363. 562. 585. 856.
8. Mod. 244.
1. Peer. Wms. 43. 766.
3. Peer. Wms. 371.

Holt, *Chief Juſtice.* We do not prohibit you from committing adminiſtration, which you may do if the adminiſtration committed by the commiſſary be void, as you ſay; but we prohibit the repealing of an adminiſtration which for aught we know is duly committed; and if it be by the archbiſhop, *quatenus* he is a metropolitan, though there be no *bona* * *notabilia*, it is good till * [147] repealed; and if it be void, he may commit a new adminiſtration without any more ado, and then let the two adminiſtrators contend the matter between them; but we will not repeal this, becauſe it is in derogation of your juriſdiction below; for you yourſelves would commit it to this perſon that now has it. But all the queſtion is, Whether you or they ought to grant it of right? And where you both pretend right, it will be hard to let you be your own judge; and all depends upon the conſtitution of the province of *Canterbury*; for if there be ſuch a uſage for them to grant prerogative adminiſtration, it is hard to hinder them of it; and the matter being thus, it is fit *a prohibition* ſhould go, and then we will give judgment final, and then you may bring writ of error if you pleaſe.

And here it was ſaid, that if adminiſtration be committed in a dioceſe where there are *bona notabilia*, though ſuch grant be *ipſo facto* void, yet they do not grant a new adminiſtration in THE PREROGATIVE-COURT before they repeal that, and in that caſe they ſhall not be prohibited; but this here is different, being a queſtion of right.

At laſt it was propoſed as an expedient to try the queſtion, that *Sir Richard Rains* ſhould bring an action on the caſe againſt the commiſſary for granting a prerogative adminiſtration to the prejudice of his juriſdiction, or that he ſhould bring an *indebitatus aſſumpſit* for the fees, as for money received to his uſe.

And the laſt was done by conſent (*a*).

(*a*) See Sir William Saunderſon *v.* Bignal, 2. Stra. 747. Duppa *v.* Gerrard, Salk. 78. Stockhold *v.* Collington, Salk. 330. Mayor of Exeter *v.* Tremlet, 2. Wilſ. 95. Steward *v.* Baker, 1. Term Rep. 618.

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Caſe 194.

Taylor *againſt* Rains.

The Court will prohibit the ſpiritual court from granting probate of *a will* made by a *feme-covert*, although by marriage-articles ſhe was authorized to make an *appointment*.
Comb. 242.
Ch. Caſ. 21. 117.
Hob. 216.
2. Sid. 58.
2. Vent. 19.
1. Show. 91.
2. Show. 247.
1. Salk. *339.
3 Salk. 65.
4 Co. 60.
Hard. 463.

A WOMAN before marriage had articles of ſettlement made with her intended huſband to this purpoſe:

She being poſſeſſed of a leaſe for years, the articles were, that ſuch perſon ſhould have the profits of the ſaid term as the wife ſhould by writing under her hand, or by her laſt will, appoint. The woman, the day before her marriage, made a will, deviſing the truſt of the term to *B.* and then married; and after her death, the executor appointed in that will would prove it in the ſpiritual court.

The huſband moved for a prohibition, upon a ſuggeſtion, that ſhe was a *feme-covert* at the time of her death, and therefore could not make a will or executor. 4. *Co. Forſe and Hemblinge's Caſe.*

And it was agreed now by THE COURT and THE BAR, that a * *feme-covert* can make no will, but either as executrix, or by conſent of her huſband, or of ſuch goods and chattels as by marriage are not given to the huſband; and that likewiſe by conſent of the huſband.

TAYLOR *against* **RAINS.**

And it was agreed by THE COURT, that this will, though in purſuance of a ſettlement of articles before marriage, was not ſuch a will of which they had any juriſdiction below, but it amounted to *an appointment* in equity, who ſhould have the truſt according to the ſaid articles (*a*).

Equity ſhall have cognizance of appointments.
2. Com. Dig. "Chancery" (2. F.).

And IT WAS FARTHER ADJUDGED, that if one has the truſt of a term for years, and dies inteſtate, his next of kin ſhall have adminiſtration of it, and adminiſtration may be granted *quoad, &c.* as well as an executor may be *quoad.*

Next kin ſhall have adminiſtration of a truſt-term.

And IT WAS LIKEWISE DECLARED, that the way here had been, to grant adminiſtration to them to whom ſhe had appointed the truſt, and not to proceed by way of probate of will.

Appointee muſt take adminiſtration.
Ante, 137.

And THE COURT held, a prohibition might go after ſentence in this caſe.

6. Mod. 152.

(*a*) See 1. Brown C. C. 147.

Hart *againſt* Longfield.

Caſe 195.

INDEBITATUS ASSUMPSIT. There were ſeveral counts in the declaration; and demurrers to ſome, and iſſues taken upon others.

An *indebitatus aſſumpſit* lies for boarding a ſtranger at the defendant's requeſt.

One of the counts, to which there was a demurrer, was this: The plaintiff declared, that whereas ſuch a day and year the defendant was indebted to him in ſuch a ſum for nouriſhing *Edward Longfield*, at the requeſt and inſtance of the defendant, and that he, the defendant, promiſed to pay him. There was alſo a *quantum meruit* for nouriſhing the ſaid *Edward Longfield* for the ſame time.

S. C. 2. Ld. Ray. 841.
1. Salk. 218.
Ld. Ray. 982.

THE FIRST EXCEPTION was, That an *indebitatus aſſumpſit* did not lie in the caſe; and to prove this the caſe of *Sands v. Trevilian* (*a*) was cited, where *A.* deſired *B.* to be attorney for *J. S.* and undertook to pay him his fees, and ſuch fees as he ſhould give to Counſel; and it was adjudged, that an *indebitatus* would not lie againſt *A.* And alſo the caſes of *Heriſon v. Burridge* (*b*) and *Rozer v. Rozer* (*c*).

THE SECOND EXCEPTION was, That the firſt declaration being an *indebitatus* for nouriſhing of *Edward Longfield* for ſuch a time, there is likewiſe a *quantum meruit* for the ſame nouriſhing, and it is contradictory, that there ſhould be one agreement to pay ſo much as it ſhould be worth, and another to pay a ſum uncertain, and both ſtand.

Several ſatisfaction cannot be demanded in the ſame declaration for the ſame thing.
1. Salk. 213.

(*a*) Cro. Car. 107. 194.—But ſee Ambroſe v. Rowe, 2. Show. 421.

(*b*) Mocr, 701.

(*c*) 2. Vent. 36.

HOLT,

HART *againſt* LONGFIELD.

Ante, 106.

* HOLT, *Chief Juſtice.* There cannot be two agreements, and both ſtand for the ſame thing at the ſame time; for in ſuch caſe, the laſt will deſtroy the firſt, and the laſt will only ſtand; but the way had been, to aver them to be different children; and that is the right way, when a *quantum meruit* and *indebitatus* is brought for the ſame thing; for here you ought to multiply *Edward Longfield* as often as you multiply your declaration.

But as to the other objection, Cannot *A.* be indebted to *B.* for doing good to *C.*? For if *A.* ſhould ſay to *B.* "Give ſuch a "quantity of goods to *C.* upon my account, and I will pay you;" or, "Make *J. S.* a cart, and I will pay you for it;" ſurely an *indebitatus* will lie againſt *A.* in that caſe. The ſale properly is to him upon whoſe requeſt it is given, and not to him to whom it is given: but an *indebitatus* will not lie for being *an attorney* to a third perſon, becauſe in that caſe his being an attorney on record is what entitles him to *debt*; and therefore, if another promiſe to pay, yet he for whom he is an attorney on record is not diſcharged, and therefore the other cannot in that caſe be liable to an *indebitatus*. And in the caſe of the cloth put before, no action lies againſt him to whom it is delivered, but only againſt him upon whoſe requeſt it is ſold.

And THE COURT directed the plaintiff to enter a *non proſ'* upon all but the firſt, and take judgment upon that: and ſo it was done.

Caſe 196.

The Queen *againſt* Pigeonry.

Quoddam venenum, ANGLICE "*antimony*," is good.

THE DEFENDANT was indicted, for that he did put *quoddam venenum*, ANGLICE *antimony*, into a cup of beer, and gave it to *J. S.*

4 Co. 446.
9. Co. 81.
Keb. 52.
Ld. Ray. 1169.
Hale P. C. 216. 218.

THE FIRST EXCEPTION was, That "*venenum*" is *Latin* for the generical word *poiſon*, but not for any ſpecies of it, as this is.

But this exception was over-ruled upon the caſe of *Holton v. Rawworth* (a).

Alchymiſt is not a good addition.

THE SECOND EXCEPTION was, That he was called by the addition of "*alchymiſta*," which was none at all.

But THE COURT would not quaſh it, having a freſh memory of a foul practice not long before by intoxicating phyſic.

(a) Hardres, 361.—This was an information upon ſeizure of *Canary wines*. THE INFORMATION ſtated them to be, "fifty-five *pipas vini*, ANGLICE *Canary* "wines;" and it was objected, that the particular ſpecies of the wine was not deſcribed by any *Latin* word in the information. But HALE, *Chief Baron*, held it to be well enough; for there is only a ſpecification of the wine, and the general word being expreſſed in *Latin* is ſufficient.

* Sylveſter's Caſe.

Caſe 197.

"*Alien enemy*" is a good plea in abatement.

S. C. Fort. 221. Lut. 34. 1. Ld. Ray. 282. Dougl. 250. 1. Bac. Abr. 8vo edit. 6.

SYLVESTER was a *French refugee*. To an action brought by him, it was pleaded *in abatement*, that he was an *alien enemy*, born under the ligeance of THE FRENCH KING, then in war with the queen.

To this there was a demurrer.

And PER CURIAM, The plea is good (*a*); for though he be a poor refugee, and under the queen's protection, which enables him to ſue, yet whether his protection be ſpecial, or general as by proclamations, he ought to plead it.

A plea of *alienage* may pray judgment of the *bill*.

Ld. Ray. 283. Stra. 1082.

And PER CURIAM, If a writ be abateable in itſelf, as being for a wrong man, the defendant may ſay, *petit judicium de billâ*, becauſe there the action is ill conceived; but where the writ is well conceived, but bad for *miſnomer*, the defendant cannot conclude ſo.

If an alien enemy has *a licence*, it is incumbent on him to plead it.

And PER CURIAM, If an *alien enemy* come into *England* without the queen's protection, he ſhall be ſeized and impriſoned by the law of *England*, and he ſhall have no advantage of the law of *England*, nor for any wrong done to him here (*b*); but if he has a general or a ſpecial protection, it ought to come of his ſide in pleading.

(*a*) See Co. Lit. 127. 129. Dyer, 2. Salk. 46. 1 Ld. Ray. 282. 1. Com. Dig. "Abatement" (E. 4). and the caſe of Brandon *v.* Neſbit, 6. Term Rep. 23.

(*b*) See Dyer, 2.

Anonymous.

Caſe 198.

Judgment againſt caſual ejector.

Ante, 118.

PER CURIAM. To have judgment ſigned againſt a *caſual ejector* ſtand, all things muſt be very fair on the plaintiff's ſide, for the defendant loſes his poſſeſſion by a fictitious proceeding (*a*).

8. Mod. 109. 118. Stra. 531. 899. 960. 1180.

(*a*) The Courts will not give judgment in ejectment unleſs an affidavit be made that the tenant in poſſeſſion was ſerved with a copy of the declaration. By 11. *Geo.* 2. c. 19. "Such tenant muſt "give notice thereof to his landlord "under the penalty of three years im- "proved rent: and the landlord may, by "leave of the Court, make himſelf de- "fendant with the tenant in poſſeſſion, "in caſe he appear; and in caſe ſuch "tenant ſhall refuſe or neglect to appear, "judgment ſhall be ſigned againſt the "caſual ejector; but if the landlord ſhall "deſire to appear by himſelf, and con- "ſent to enter into the like rule as the "tenant, in caſe he had appeared, ought "to have done, the Court ſhall permit "him ſo to do, and order a ſtay of exe- "cution upon ſuch judgment till further "orders."—See ante, 70. Salk. 257. 3. Burr. 1301. Runnington's Eject. 2d edit. p.

Caſe 199. The Queen *againſt* King.

Forging a bail-bond to the ſheriff is an indictable offence.

S. C. Holt, 376.
S. C. 1. Salk. 342.
2. Lev. 111. 221.
3. Leon. 170.
3. Salk. 171.
1. Salk. 342.
Fitzg. 266.
6. Mod. 180.

AN INDICTMENT OF FORGERY removed up out of *London*, and demurred to here.

The caption was, that "*per ſacramentum*" of the jury by the names "*proborum et legalium hominum, qui pro dominâ reginâ pro* "*corpore com. præd. triat. jurat. et onerat. exiſtentes præſentat.* "*exiſtit. quod*" the defendant, &c. "*falſò et malitioſè, &c. quodd.* "*ſcriptum obligatorium fabricavit et contrafecit.*"

And ſeveral exceptions were taken.

FIRST, To the caption, there being no verb to the nominative *qui triat. jurat. et onerat. exiſtentes*; and ſo it was ſaid to be nonſenſe. And the caſe of *Rex v. Thorowbridge*, in *Trinity Term*, in the ſixth year of *William the Third* (*a*), was quoted, where the judgment was reverſed on a writ of error, for want of a nominative caſe to the verb.

HOLT, *Chief Juſtice*, ſaid, What matter is it whether a man be hanged by good or bad *Latin*; and he could ſhew worſe *Latin* than this in many writs; as in the writ of adjournment, which runs thus: "*Rex Juſticiar. ſuis ad placita coram nobis, &c.*"

And it was reſolved by THE COURT, that this indictment is to be conſidered as if it were an indictment of *high-treaſon*; and if it were ſuch, it would be good, notwithſtanding *the caption*; for it is no uncertainty in *the charge*.

* [151]

An indictment that he forged a *falſe deed* is good.

*THE SECOND EXCEPTION was, That the crime charged was the forging falſly, whereas it could be no crime if it was not truly forged.

3. Mod. 122.
Yelv. 72.
Cro. Jac. 178.
Cro. Car. 337.

HOLT, *Chief Juſtice*. The *falſò fabricavit* is as much as to ſay, that "he being a falſe and malicious man did forge," and not that the forgery was a true forgery, but that the thing forged was not true but falſe.

An indictment for forging a certain falſe writing obligatory is good.

THE THIRD EXCEPTION. If it were a forgery, it could not be a *ſcriptum obligator.* for a forged deed is not obligatory; therefore it ſhould be for forging *quodd. ſcriptum*, purporting a writing obligatory.

1. Salk. 342.
3. Salk. 171.
2. Ld. Ray. 920.
1. Show. 2.

HOLT, *Chief Juſtice*, ſaid, that it could not be *obligatorius* if it was forged; it is not in truth and reality binding, but in ſhow and appearance it is, and that is enough; ſo it is an obligation, though a falſe one.

Falſe *Latin* ſhall not vitiate an indictment.

THE FOURTH EXCEPTION, That a forgery to the prejudice of nobody cannot be a crime; and the pretended bond could be to

1. Salk. 375. Ld. Ray. 530. 737. 921. 1464. 1523. Fitzg. 57. 261. 3. Peer. Wms. 419. Stra. 18. 747. 901. 1144.

(*a*) Comb. 307. 1. Salk. 371.

nobody's prejudice; for it was a bond to the ſheriff of *London* for the appearance of a perſon under arreſt *à die Purificationis in octavis diebus*, and there is no ſuch day, and therefore the bond is not according to the ſtatute, therefore void; and by conſequence the forgery no crime, becauſe no prejudice to any.

It was held, that the *octavis diebus* may be well underſtood for *the octave* of the, &c. Beſides, theſe bonds are not merely void by the ſtatute, but only voidable; and therefore you muſt plead the ſpecial matter, and not *non eſt factum*: and you may ſay, that a forged bond binds * nobody, as in truth it does not, and infer from thence, that it is no crime to forge.

And the queen had judgment, and *King* ſtood in the pillory.

Brook *againſt* Biſhop.

Caſe 200.

In treſpaſs *quare clauſum fregit* on ſuch a day, and cutting trees, with a *continuando*, the *continuando* is void; and if entire damages be given, they ſhall be intended for ſuch treſpaſſes as are well laid.

TRESPASS for breaking the plaintiff's cloſe, and entering into it, treading his graſs, and cutting ſo many trees to the quantity of ten cart-loads, and carrying them away on ſuch a day, *tranſgreſſionem præd. continuando*, from ſuch a time to ſuch a time.

After verdict for the plaintiff,

It was moved *in arreſt of judgment*, that damages were entire, and part of the treſpaſs did not lie in a *continuando* (*a*), and yet damages were given for that too. And though it was objected, that if it could not be continued, no damage could be given in reſpect thereof, according to the caſe of *Butler v. Hodges* (*b*), yet under this *continuando* ſeveral new acts of treſpaſs might be given in evidence, and ſo damages recovered for them.

S.C. 2. Salk. 639.
S.C. 3. Salk. 359.
S. C. Holt, 698.
S. C. 2. Ld. Ray. 823.
T. Jones, 194.
Skin. 42.
2. Show. 196.
5. Mod. 179.
5. Com. Dig. "Pleader" (3. M. 10.).
Comy. 231.
Stra. 422.

Per Curiam. The right way in treſpaſs for repeated acts of treſpaſs would be, that on ſuch a day, and *diverſis aliis diebus et vicibus*, between ſuch a day and ſuch a day, the defendant did ſo and ſo (*c*). But in this caſe the *continuando* is impoſſible, and therefore no damages could be given for it; and the only miſchief poſſible would be that of giving other acts of treſpaſs in evidence by pretence of it; but that ought not to be ſuffered, and therefore not to be intended (*d*).

Another exception was, That the declaration was generally of *Eaſter Term*, and yet it appeared that the treſpaſs was committed after the twenty-firſt of *April*, which was the *quinden. Paſchæ*.

If the Term be adjourned, the memorandum ſhall apply to the day of adjournment. Ante, 1.

But per Curiam, That Term was adjourned by proclamation to the ſecond return, which was the twenty-ninth. All declarations ſhall refer to that.

And here the plaintiff had judgment.

(*a*) See 1. Sid. 224. 1. Ld. Ray. 239.

(*b*) 1. Lev. 210. 1. Sid. 319. 2. Keb. 173. 203. 215.

(*c*) Year-Book 20. *Hen.* 6.—See alſo 1. Ld. Ray. 240. 2. Ld. Ray. 977. Comb. 427.

(*d*) See the caſe of Clayton *v.* Gillam, 2. Show. 196. in point.

The

Caſe 201.

* The Queen *againſt* Foxworthy.

Pardon of murder amended, by inſerting the word “ *attincturas*.”

S. C. Salk. 500.
S. C. Holt, 521.
S. C. 2. Ld. Ray. 848.
Ld. Ray. 214. 637. 709.

FOXWORTHY was attainted of murder for the killing of one who had come in aid of the conſtable to arreſt him upon a warrant; and having obtained his pardon, he was brought to the bar to plead it; and it being read, the word “ *attincturas*” was not in.

HOLT, *Chief Juſtice*, thereupon ſaid, that he would conſider before he would allow it.

Upon which the priſoner was remanded.

And at another time, the pardon being amended, and *attincturas* put in, he was brought up, and the pardon allowed, which was upon condition that within ſuch a time he would repair on board one of the queen's ſhips, and ſerve three years in the *Weſt-Indies* on board it.

A *convict* may be charged with an action, if it will not fruſtrate the effect of a pardon.

DEE, *Common Serjeant*, moved for leave to charge him with an action in the cuſtody of THE MARSHAL.

But becauſe, if he could not pay the debt or find bail, the pardon might be thereby fruſtrated, THE COURT would not grant leave.

S. C. 2. Ld. Ray. 848. 2. Salk. 500. B. R. H. 190. 1. Black. Rep. 30. 1. Wilſ. 127. 217. Foſter, 61. Tidd, 195.

Breach of the peace deſtroys a pardon, although it has been allowed.

Stra. 473. 1203.

AND IT WAS AGREED, that if, in this caſe, after the allowance of the pardon, he had broke the peace, he might, notwithſtanding the pardon, be detained for that offence, to the deſtruction of his pardon; and in ſuch caſe he would be brought up here again, and aſked, what he had to ſay why ſentence ſhould not paſs; and if he pleaded the pardon, THE ATTORNEY-GENERAL would reply the condition and breach, &c.

Caſe 202.

Robinſon *againſt* Walker.

A covenant that *A.* and *B.* “ *convenerunt pro ſe et quolibet eorum*” is joint and ſeveral.

COVENANT. The plaintiff declared, that the defendant and *J. S.* did *convenire pro ſe et quolibet eorum, &c.* that they or either of them would lade ſuch a ſhip at ſuch a place, and pay the plaintiff for the freight, &c.

The defendant pleaded *in abatement*, that the other covenanter was in full life, not named in the writ.

S. C. 1. Salk. 393.
2. Co. 10.
5. Co. 53. 119.
Poſt. 154.
Co. Lit. 144.
3. Leon. 269. Dyer, 19. 320. Cro. Jac. 45. 3. Bac. Abr. 697.

And IT WAS AGREED by all, that *obligamus nos et utrumque noſtrum* was joint and ſeveral.

* But HOLT, *Chief Juſtice*, declared, that he thought there might be a diverſity between “ *A. et B. conveniunt et quilibet eorum*

" *convenit*," and " *A. et B. conveniunt pro ſe et quolibet eorum*;" for in the firſt " *quilibet eorum convenit*" expreſsly ſevers *the lien*, but "*pro quolibet eorum*" ſeems to go to the thing to be done; that is, that they both or either of them would do it. And one may covenant, " that he *or A.* will do ſuch a thing. So if two covenant, " that they *or* one of them ſhall do ſuch a thing," that is a joint covenant only; and the word " *conveniunt*," and not " *pro quolibet eorum*," makes *the lien.*

3. Peer. Wms. 405. Ld. Ray. 1199. 1203. Stra. 503. 553. 610. 910. 1146.

But THE OTHER JUDGES *contra*; and no difference between this and the caſe of " *obligamus nos et utrumque noſtrum.*"*

And judgment was given, *quòd reſpondeat ulterius*

Cutting *againſt* Williams.

Caſe 203.

If a declaration contain two counts, one upon a note of hand upon the cuſtom of merchants, and the other upon an *indebitatus aſſumpſit*, and the jury give ſeveral damages, but the judgment is entered, " that the plaintiff recover his " *damages by the* " *ſaid jurors in* " *form aforeſaid* " *aſſeſſed, which* " *in the whole* " *amount to ſo* " *much, &c.*" the judgment is void *in toto*; for previous to the 3. & 4. *Anne*, c. 9. a note of hand was not within the cuſtom of merchants; and where one of ſeveral counts is bad, and an entire judgment is given, it cannot be reverſed in part only.—S. C. 2. Ld. Ray. 825. S. C. 11. Mod. 24. S. C. 1. Salk. 24. S. C. Holt, 273. S. C. Lilly Ent. 227. Ante, 152. Hob. 6. Cro. Car. 339. Cro. Jac. 343. 1. Roll. Rep. 24. Allen, 75. Ld. Ray. 1382. Fitzg. 85. 255. Stra. 1036. Dougl. 377. 730, 731.

ERROR OF A JUDGMENT in the court of common pleas. The declaration contained ſeveral counts, and one of them was upon the *cuſtom of merchants*, upon A NOTE given by the defendant to the plaintiff, promiſing to pay him ſo much money. Several damages were given, but there was only one judgment for the plaintiff below for the ſeveral damages.

It was aſſigned for error, that the count upon the *cuſtom of merchants* was void; and therefore there being one entire judgment, all was void, and that the judgment ought to be reverſed *in toto*. And the caſe of *Martin v. Clerk* (*a*) was quoted as an authority in point.

NOTE here, Both the damages were caſt up together, and judgment entered for them, with a *quæ in toto ſe attingunt* to ſo much, that is, *quòd recuperet damna ſua prædict. aſſeſſ. quæ in toto ſe attingunt* to ſo much, which total comprehends both the damages.

To maintain that the judgment ought to be reverſed only in part, the caſe of *Jacob v. Mills* (*b*), of *Peck v. Ambler* (*c*), and of *Rymer v. Grimſtone* (*d*), were urged.

BUT *on the other ſide* was quoted the caſe of *Lloyd v. Pearce* (*e*), a judgment in point to the contrary four years after, where the judgments are diſtinct and upon diſtinct laws; as in *dower*, where the judgment for recovery of the dower is by common law, and to recover damages by the *ſtatute of Marlbridge*, or in a *quare impedit*; for there is judgment for the church at common law, and for damages by the ſtatute; and in that caſe, * judgment may ſtand for one, and be reverſed for the other (*f*). An action was brought upon ſeveral promiſes, and ſeveral damages aſſeſſed, and one judgment given for both; and upon a writ of error it appeared, that an action

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(*a*) 2. Ld. Ray. 757. S. C. 1. Salk. 129. 364.

(*b*) Hob. 6.

(*c*) Cro. Car.

(*d*) Moor, 708.

(*e*) Cro. Jac. 424.

(*f*) 1. Roll. Abr. 775. pl. 4. Allen, 74.

did not lie for one of them, and therefore the judgment was reverſed *in toto (a)*. The caſe of *Mills v. Jacob (b)* is denied to be law, and ſo was the caſe of *Bernard v. Bernard (c)*. In the caſe of *Antel v. Oats (d)*, aſſault and battery was brought againſt three, one whereof was an infant, and all of them appeared by attorney, and judgment was given againſt all; and it was reverſed *in toto*, becauſe the infant appeared by attorney. The way had been to enter a *remittitur* for that which is not maintainable, and take judgment for the reſt (*e*).

Hob. 6. Cro. Jac. 343. 1. Roll. Rep. 24.

Holt, *Chief Juſtice.* It has been held as you ſay in the caſe of *Jacob v. Mills*, but certainly ever ſince the Courts have been of a contrary opinion. And there are but two judgments in the books that favour that opinion of reverſing judgment in part. I remember to have heard it debated here many years ago, and the Court then were of opinion, that it would be bad in the whole; for the whole judgment is wrong, for it is for more damages than ſhould have been recovered, and not for ſo much damage upon one promiſe, and ſo much upon another promiſe; for if it were ſo, it might perhaps be ſeveral judgments, and in conſequence one might be reverſed without the other; but the judgment here is to recover "*the damages aforeſaid*," which are the whole damages.

Allen, 75. Cro. Car. 339.

Powell, *Juſtice*, ſaid, he had known the caſe of *Jacob v. Mills* denied to be law many a time, and that there are twenty reſolutions to the contrary; that is, if a *remittitur* be not entered for part, that it will be bad for all; for the judgment is of the whole.

And they were all of opinion, that if one of the declarations were ſuch on which no damages ought to be recovered, it would be bad.

Ante, 88.

Holt, *Chief Juſtice*, as to the other point, ſaid, that he had propoſed it to all the Judges, and that they were all of opinion, that a declaration upon the *cuſtom of merchants* upon a note, ſubſcribed by the defendant to the plaintiff for ſo much money, or promiſing ſo much money, was void; for it tended to make *a note* amount to *a ſpecialty* (*f*).

(*a*) 1. Keb. 232.

(*b*) Hob. 6. S. C. Cro. Jac. 343. S. C. Jenk. 339. S. C. 1. Roll. Rep. 24. S. C. Co. Ent. 25.

(*c*) Mich. Term, 22. *Car* 2. in the king's bench, 2. Keb. 696. 699. 708. 716.

(*d*) Stiles, 121. 125. S. C. Allen, 74.

(*e*) 3. Keb. 199. 213. 1. Vent. 27. 39. 2. Keb. 506. 535. 2. Saund. 379.

(*f*) But now by 3. & 4. *Anne*, c. 9. "All notes in writing made and ſigned "by any perſon, whereby he ſhall pro- "miſe to pay to any other perſon or his "order, or to bearer, any ſum of money "mentioned in ſuch note, ſhall be taken "and conſtrued to be, by virtue thereof, "due and payable to any ſuch perſon to "whom the ſame is made payable; and "every ſuch note ſhall be aſſignable and "indorſable over in the ſame manner as "inland bills of exchange; and the "perſon to whom ſuch ſum is by ſuch "note made payable, may maintain an "action for the ſame in the ſame manner "as on inland bills of exchange made or "drawn according to the cuſtom of "merchants, againſt the perſon who "ſigned the ſame; and any perſon to "whom ſuch note is indorſed or aſſigned "may maintain an action thereon, either "againſt the drawer or indorſer, in like "manner as in caſes of inland bills of "exchange."

And judgment *ſuper inde* was reverſed *in toto* by THE WHOLE COURT.

CUTTING *againſt* WILLIAMS.

Caſe 204.

* Owen *againſt* Atkinſon.

AFTER PLEA pleaded, and replication and rejoinder ſo part, and iſſue, notice of trial with proviſo as to the other, and rule ſerved to make up the iſſue, to carry it down to trial;

Amendment of the *niſi prius* roll.

Ante, 49. 102. 123.

And the *niſi prius roll* being engroſſed in parchment, but all the proceedings above continuing in paper, the plaintiff had leave to amend upon payment of coſts.

8. Mod. 226.
Ld. Ray. 95
116. 134. 183.
548.

NOTE here, The record of *niſi prius* was made up, though the record above was not; and that was ſaid to be done frequently; and it is never denied to amend upon payment of coſts while things continue in paper.

Amendments may be made while proceedings are in paper.

NOTE ALSO, A caſe cannot be carried down to trial by *proviſo* until the iſſue is made up; and therefore the defendant ought to ſerve a rule upon the plaintiff to make up the iſſue (*a*).

A cauſe cannot be carried down by *proviſo* till iſſue made up.

Grovenor *againſt* Fenwick.

Caſe 205.

AFTER A TRIAL AT BAR, and verdict for leſſees in ejectment, *a new trial* was moved for, upon *the merits* of the cauſe, and alſo upon *an affidavit* brought into court.

The Court will not grant *a new trial* after a trial at bar, except for the miſbehaviour of the prevailing party towards the jury or witneſſes.

The affidavit contained in ſubſtance, that the defendant's witneſſes were kept back by a report ſpread in *Holland*, where they were in their way to *England*; and that the witneſſes that were already come over had been laid by the heels; but it did not name any who had ſpread the report, or that it was by the agents or perſons employed by *Fenwick*.

S. C. ante, 121.
156.

And though THE COURT were diſſatisfied with the verdict upon ſeveral reaſons, one whereof was, that the trial laſted above ſixteen hours, and abundance of evidence was given on both ſides, and the jury were agreed on their verdict in half-an-hour's time, yet THE COURT would not grant a new trial. And the caſe of *Gay v. Croſs* (*a*), heretofore, was remembered; for the Court declared, that after A TRIAL AT BAR they would not eaſily grant a new

S.C. 1. Salk. 258.
S.C. 2. Salk. 650.
S. C. Holt, 265.
Ante, 37. 70.
121.
5. Mod. 88. 350.
6. Mod. 18. 22.
307.
Ld. Ray. 514.
1359.
Gilb. Eq. Rep. 2.
Stra. 1105. 1142.

(*a*) But the neceſſity of carrying a cauſe to trial by *proviſo* is now, in many caſes, rendered unneceſſary, by the ſtatute 14. *Geo.* 2. c. 17. which gives judgment as in caſe of a nonſuit, if the plaintiff do not proceed to trial according to the practice of the court.—See Proude *v.* Williams, 1. Bar. K. B. 18. Dodſon *v.* Taylor, Stra. 1055. Rex *v* Pippet, 1. Term Rep. 492. 696. Jones *v.* Concannen, 3. Term Rep. 661. Humpage *v.* Rowley, 4. Term Rep. 767. Porzelius *v.* Mattocks, 1. H. Bl. Rep. 101. Tidd's Practice, 493.

(*a*) Ante, 37.

GROVENOR *againſt* FENWICK.

a new trial, more eſpecially in ejectment (*a*), where the firſt verdict is not peremptory, and where there is no foul practice made appear in the jury or party for whom the verdict was; as keeping back of witneſſes, &c.; in which caſes alone it was diſcretionary in the Court to grant it (*b*).

The Court will not permit an *affidavit* to be amended after the fact required to be atteſted is diſcloſed to the deponent.

AND HERE they begged leave to mend their affidavit;

Which was oppoſed for this reaſon, that now they had learned of the * Court what would do their buſineſs, it would be dangerous to let them in to ſwear it.

To which HOLT, *Chief Juſtice*, ſaid, that it was frequent in chancery, after a witneſs had ſworn before a maſter, to examine him again *vivâ voce* in court.

* [157]

But POWYS, *Serjeant*, replied, that it was no frequent thing ſo to do; for in all his time he had known it done but twice.

And POWELL, *Juſtice*, declared his diſlike of mending affidavits, where the party knew before what was neceſſary, and had not ſworn it (*c*).

(*a*) But ſee inſtances of new trials granted after a trial at bar, Stiles, 462. 466. 1. Stra. 584. 2. Ld. Ray. 1358. 2. Stra. 1105. 1. Burr. 395.—So alſo in ejectment, 4. Burr. 2224. Bull. N. P. 326. 1. Term Rep. 11. 2. Term Rep. 281.

(*b*) See 1. Stra. 643. 2. Salk. 645.

(*c*) It is ſaid, that a new trial was denied; but that it was againſt the opinion of the Chief Juſtice, S. C. 2. Salk. 650.

Caſe 206. Cooper *againſt* The Hundred of Baſingſtoke.

Eaſter Term, 13. *Will.* 3. *Roll* 431.

If a perſon be aſſaulted by thieves in the hundred of *A.* and carried into the hundred of *B.* and there robbed, an action lies on the ſtatute of *Hue and Cry* againſt the inhabitants of the hundred of *B.*

AN ACTION againſt the hundred upon the *ſtatutes of Wincheſter* (*a*), of HUE AND CRY. A *ſpecial verdict* was found at the aſſizes to this effect;

The plaintiff was travelling in the highway, within the hundred of *Michel*, in the county of *Devon*, and was there aſſaulted and ſet upon by ſeveral malefactors to him unknown, who took poſſeſſion of him, and carried him into a coppice hard by the ſaid highway, in the hundred of *Baſingſtoke*, and there robbed him.

The queſtion was, Whether the hundred of *Baſingſtoke* be chargeable with this robbery?

This caſe was argued ſeveral times at THE BAR.

HOLT, *Chief Juſtice*, now, this Term, declared the unanimous opinion of THE COURT, that the hundred of *Baſingſtoke* is chargeable. It has been endeavoured to be maintained, that this robbery was committed in the hundred of *Michel*; but it is moſt plain upon the

S. C. 2. Salk. 614.
S. C. 11. Mod. 8.
S. C. Holt, 638.
S.C. 2. Ld. Ray. 826. 3. Salk. 184. 1. Show. 60. 5 Mod. 150. 160. 263. 2. Salk. 613. 3. Mod. 258. 287. 4 Mod. 383. 2. Saund. 379. 423. Comy. 327. 345. 478. Stra. 406. 1170. 1247.

(*d*) 13. *Edw.* 1. ſt. 2. c. 1.; and 2. and 28. *Edw.* 3. c. 11.

words of the verdict, that it was wholly committed in the hundred of *Baſingſtoke*; for without all queſtion, if theſe had been two counties, as they are two hundreds, and he had been taken in one county and carried into the other, and there robbed, the robbers muſt have been tried where the robbery was committed. Now then, if the robbery be committed in the hundred of *Baſingſtoke*, by the expreſs words of the ſtatute it is chargeable, ſo that the hundred where the robbery is committed ſhall be liable to make ſatisfaction for the robbery. Now it is impoſſible in this caſe to make the robbery committed in the hundred of *Baſingſtoke* to be a robbery from the time of the aſſault, which was in the hundred of *Michel*, in *Devon*, for there is no manner of reaſon to make a relation in this caſe; for it is no way like the * caſe of murder, where the ſtroke is on one day, and the death on the other; there, to ſome purpoſes, there is relation to the firſt day, but not to all purpoſes. It has relation to make all the lands the party had at the time of the ſtroke given eſcheat, and to forfeit his eſtate for life to the king; but to other collateral purpoſes it has not any ſuch relation: for if a man be indicted, for that he gave a mortal ſtroke to *A.* on ſuch a day, whereof he languiſhed until ſuch a day, and ſo the jury does ſay, that the party indicted did murder the party ſlain on the day of the ſtroke given, it will be bad; but they may conclude that he killed him on the day of his death (*a*). In this caſe, there is no robbery committed until the plaintiff is in the hundred of *Baſingſtoke*; for there the taking away is, which is the fact that makes the hundred chargeable. Beſides, in the caſe before put of the relation, if *A.* give a mortal wound to *B.* on the third of *March* ſuppoſe, whereof the party dies the laſt of *March*, between theſe two days *C.* has received and comforted *A.* or, if a conſtable had him in his cuſtody, and ſuffered him to eſcape between the two days, *C.* ſhould not be acceſſary to the felony, nor the conſtable guilty of the eſcape of a felon (*b*). The pardon of "all offences and miſde-"meanors" after the ſtroke, and before the death, pardons the murder that follows; that is, Suppoſe a pardon be of "all offences com-"mitted by him before the tenth of *March*;" that pardons the ſtroke, and by conſequence the murder that enſues by the death of the party; but in our caſe, there is not any colour for a relation: for the aſſault is not the immediate and efficient cauſe of the robbery, but is only the occaſion or cauſe *ſine quâ non* of it; therefore there is no neceſſity of a relation to it; and if there be no relation, then of neceſſity that hundred muſt be liable where the fact is committed, and that is the hundred of *Baſingſtoke*. This is not a new caſe, but has been determined already. In *Dean's Caſe* (*c*), *A.* is aſſaulted in one hundred, and flies into another hundred, and being ſtill purſued by the robbers in purſuance of the aſſault, he is there taken and robbed; there is as much reaſon to make this robbery

* [158]

Hale, 54.
3. Co. 99.
5. Co. 2.

(*a*) 4. Co. 41.

(*b*) Year-Book 11. *Hen.* 4. pl. 49. Plowden, 401.

(*c*) Hutton, 125.

COOPER *againſt* THE HUNDRED OF BASINGSTOKE.

1. Goldſb. 155.
2. Goldſb. 280.

relate to the firſt aſſault as there is in our caſe; and there it is held, that the hundred in which he was robbed ſhould be only charged, that is, the hundred in which the actual taking away was. * The caſe in *Goldſborough* allows this to be law: Thieves came upon a carrier and ſeized on him and his horſes, and drove his horſes into another hundred, and there they rifled his waggon; and the hundred where the rifling was was not chargeable, becauſe it was a complete robbery, by taking the carrier and the horſes into their poſſeſſion; and the rifling after does not make it a greater robbery than it was before; but if the carrier had been left in poſſeſſion of his waggon and horſes, and only obliged to lead into that place, and there the goods had been taken from him, there the place where the goods were actually taken from him had been chargeable. But the true reaſon why the hundred of *Baſingſtoke* ſtands charged is this: It is to be known, that the hundred is not charged becauſe they did not prevent the robbery, but becauſe they have not taken the malefactors after; for let the miſchief be ever ſo great, if they apprehend the malefactors within forty days, as the law ſtands now (*a*), heretofore within half-a-year, they ſhall not be charged: then here is no obligation on the hundred of *Michel*, in *Devon*; for there was no robbery committed there, and the robbery and charge does not come upon the hundred until it be completed and conſummate, and they fail of taking the robbers within the time limited; and for that default they are charged, and not becauſe of any robbery committed. The hundred is not bound to purſue a man for an aſſault, nor for a battery even to death, nor ſhall they incur any forfeitures for not apprehending ſuch offenders; and in this cauſe, there was nothing done in the hundred of *Michel* but the aſſault; and if there be no obligation on the hundred of *Michel* to take the robbers, then of neceſſity the hundred of *Baſingſtoke* muſt do it, becauſe the one or the other muſt. It is ſaid, that ſuppoſe an aſſault be made in one hundred by day, and the party is carried into another hundred, and kept till night, and then is there robbed in the night-time, it is not reaſonable in that caſe, that the hundred where the robbery is committed ſhould be charged, becauſe the robbery is by night. But I anſwer, that the remedy fails there, becauſe there is no reaſon to charge the hundred where the robbery was committed, becauſe it was by night. So
* [160] if he be taken in the highway by * day, and carried into a dwelling-houſe within the hundred, and there robbed, the action fails, becauſe the hundred is not anſwerable for robberies committed in a dwelling-houſe; but if he had been carried from the highway into an empty waſte houſe, and there robbed, I will not deliver any opinion how that would have been. And he ſaid, they were all of opinion, that the hundred ſhould be liable for a robbery committed in a private way.

Cro. Car. 267.

And by THE WHOLE COURT, judgment was given for the plaintiff.

(*a*) By ſtatutes 13. *Edw.* 1. c. 1. and 28. *Edw.* 3. c. 11. — See alſo 3. Lev. 320. 2. Saund. 376. 3 Hawk. P. C. 7th edit. ch. 12. ſ. 7. &c. and the ſtatutes 27. *Eliz.* c. 18. and 8. *Geo.* 2. c. 16.

A

COLLECTION OF CASES

ARGUED AND DETERMINED IN

THE COURTS

OF

KING's BENCH, COMMON PLEAS,

AND

CHANCERY;

FROM

EASTER TERM,

THE

SIXTH YEAR OF GEORGE THE SECOND,

TO

EASTER TERM,

THE

TWENTIETH YEAR OF GEORGE THE SECOND.

EASTER TERM,

The Sixth of George the Second,

IN

The King's Bench.

* * * * *, *Chief Juſtice (a).*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
William Lee, *Eſq.*
Sir Philip Yorke, *Knt. Attorney-General.*
Charles Talbot, *Eſq. Solicitor General.*

(a) Lord Raymond, *Chief Juſtice*, dying in the Vacation, there was at this time no Chief Juſtice, and all writs were directed to Mr. Justice Page, and *teſted* in his name.

Maccarty *againſt* Barrow.

Caſe 207.

A bill drawn before a bankruptcy, though not proteſted till after, is a *debt*, and may be proved under the commiſſion againſt the drawer.

S. C. 2. Stra. 949.
S. C. 2. Bar. K. B. 251. 255.
S. P. 2. Kel. 239.
S C. 3. Wilſ. 17.
S. C. Cook's B. L. 237.
Cowp. 543.

MR. FOWKES moved to diſcharge the defendant, who was in execution at the plaintiff's ſuit. The motion was founded on a certificate under a commiſſion of bankruptcy, obtained before the twenty-fifth of *March* laſt, according to the ſtatute 5. *Geo.* 2. c. 30. ſ. 22.

The fact, upon ſhewing cauſe, appeared to be this:

The action was brought upon ſeveral bills of exchange to a conſiderable value, which were drawn by the defendant, in the month of *December* 1728, upon a merchant at *Bilboa* in *Spain*, payable to the plaintiff, and by him immediately tranſmitted to *Spain* in order to be accepted by the perſon on whom they were drawn. The drawee refuſed to accept them, and upon his non-acceptance they were proteſted, and tranſmitted again to the plaintiff in *England*, in the month of *February* following, who brought this action againſt the drawer. But between the time of drawing theſe bills and the time of applying to the defendant for the payment of them, after they had been proteſted for non-acceptance, *viz.* the thirteenth of *January* 1728, a commiſſion of bankruptcy iſſued againſt the defendant, under which he had not regularly obtained the certificate, which was now produced to the Court.

MR. STRANGE *for the plaintiff* inſiſted,

FIRST, That the plaintiff's cauſe of action did not accrue until after the iſſuing of the commiſſion, &c.; that the drawer of theſe bills was not chargeable until there had been a tender of them to the perſon on whom they were drawn, and non-acceptance by him and a regular proteſt; and therefore, as the cauſe of action was ſubſequent to the commiſſion, the plaintiff could not have come in as a creditor under the commiſſion, and conſequently that this certificate will not affect the plaintiff's demand.

The Court may, *on motion*, diſcharge *a bankrupt* illegally arreſted.

SECONDLY, He inſiſted that this Court had no power to diſcharge the defendant in this ſummary way, but that the party's remedy was by *audita querela.* He admitted, that by the 6. *Geo.* 1. c. 22. there was ſuch a proviſion made for the diſcharge of the bankrupt in this manner where judgment was obtained againſt the bankrupt before he had his certificate; for that being *caſus omiſſus* in the 5. *Geo.* 1. c. 24. was remedied by the 6. *Geo.* 1. c. 22.; but the 6. *Geo.* 1. c. 22. was a temporary act, and is expired; and the late ſtatute of the 5. *Geo.* 2. c. 30. refers to the 5. *Geo.* 1. c. 24. only, and therefore there is no power in the Court now ſubſiſting to diſcharge the defendant in this caſe.

To hold a certificated bankrupt to bail, the plaintiff muſt ſhew good cauſe of action.

THIRDLY, He inſiſted, that the defendant ought to make it appear that theſe bills of exchange were given before any act of bankruptcy committed, and it is not ſufficient to ſhew they were drawn before the iſſuing of the commiſſion. The act of bankruptcy might be committed ſeveral years before the commiſſion iſſued, and that being once committed can never be purged; and if they were drawn between the time of the act of bankruptcy and the date of the commiſſion, there can be no pretence for this application; no act of parliament whatſoever making any proviſion for the diſcharge of the bankrupt in any other caſe than when the debt for which the action is brought was contracted before the act of bankruptcy committed, and not before the iſſuing the commiſſion.

MR. FOWKES, *for the defendant*, inſiſted,

FIRST, The objection, that the plaintiff could not come in as a creditor in this caſe under the commiſſion, becauſe his cauſe of action againſt the defendant was ſubſequent to the time it iſſued, is unfounded, for the defendant, in this caſe, became immediately a debtor to the plaintiff upon drawing the bills; this was *debitum in præſenti* though *ſolvendum in futuro*, and is a caſe clearly within the proviſion of the 7. *Geo.* 1. c. 31. which enables creditors of a bankrupt, for money payable to them at a future day, to come in for their proportion of the bankrupt's eſtate, diſcounting their ſecurities after the rate of five pounds *per cent. per annum.*

SECONDLY,

MACCARTY *againſt* BARROW.

SECONDLY, I admit there are in the 5. *Geo.* 2. c. 30. no relative words to the 6. *Geo.* 1. c. 22. upon which this power of diſcharge is founded; but that power is originally inherent to this Court by the principles of the common law, and therefore no ſuch words of reference were neceſſary to give this Court a juriſdiction in this caſe.

THIRDLY, As to the laſt objection, It is to be preſumed that the act of bankruptcy was committed about the time of iſſuing the commiſſion; and if the bills were drawn after the bankruptcy committed, that is a fact which the plaintiff ought to make out for his own benefit.

Ld. Ray. 1549.
2. Peer. Wms. 398.
Cooke's B. L. 234.

MR. STRANGE *in reply*. The 7. *Geo.* 1. c. 31. extends to ſecurities only, payable at a future day, which are taken upon the ſale of goods and merchandizes, as appears by the preamble of the act, and the words "ſuch ſecurities, &c." and this does not appear to be a caſe within that act.

PROBYN, *Juſtice*. It ſeems clear that the drawer of theſe bills was a debtor by relation from the time they were drawn (*a*).

LEE, *Juſtice*, was of the ſame opinion. He held likewiſe, that the 7. *Geo* 1. c. 31. extended to this caſe; for though the preamble mentions only "ſecurities for the ſale of goods and merchandizes, "&c." yet the enacting part is more general, and comprehends all ſorts of ſecurities payable at a future day.

THE COURT held likewiſe, that it was incumbent on the plaintiff to ſhew that the bills were drawn after the bankruptcy was committed, if he would have advantage thereof.

The defendant was accordingly diſcharged (*b*).

(*a*) Therefore, if a drawee refuſe to accept a bill of exchange, an action will lie againſt the drawer of it before it becomes payable, Bright *v.* Purrier, Bull. N. P. 269. S. P. Milford *v.* Mayer, Dougl. 54. So the indorſee of a promiſſory note may be diſcharged under an inſolvent act before the note is due, Harman *v.* Leake, Cowp. 22.

(*b*) See the caſe of Chilton *v.* Whiffin, 3. Wilſ. 13.

Hearne *againſt* Buſhell.

Caſe 208.

A writ of error *coram vobis* is not a *ſuperſedeas* after affirmance.

A WRIT OF ERROR having been brought in the court of king's bench on a judgment had in the MARSHALSEA COURT, and the judgment below being affirmed, and a new writ of error *coram vobis* being now brought;

S. C. 2. Stra. 949.
S. C. 2. Kely. 105.
S. C. 2. Barn. 253. 260.

MR. PARKER moved, that this writ of error might be quaſhed, and the defendant in error be at liberty to take out execution; the laſt writ of error being illegal, as it lies only by abatement by death, &c.

Stra. 690. 1. Salk. 321. Barnes, 205. 299. 2. Bl. Rep. 1183. 1. Term Rep. 279. 5. Com. Dig. "Pleader" (3. B. 12).

MR.

Hearne *againſt* Burrell.

Mr. Strange, *on the other ſide*, cited the caſe of *Thomſon v. Hunt* (*a*), which was a judgment obtained in THE PALACE COURT, on which a writ of error was brought in the court of king's bench, and the judgment affirmed; and afterwards a writ of error *coram vobis* was brought, and *coverture* in the defendant aſſigned for error; and it was moved to quaſh the writ of error upon an affidavit that this very defence was uſed at the trial, and a verdict notwithſtanding againſt the defendant; but the motion was denied.

Page, *Juſtice*. That caſe is very different from the preſent; for *coverture* having been pleaded in this action in the court below, and yet a verdict given againſt the defendant, it appears judicially to us upon the record that that matter has been tried below; otherwiſe in the caſe cited.

At another day,

Mr. Parker, *for the defendant in error*, inſiſted upon the diſtinction taken by Page, *Juſtice*, and that the proper time for taking advantage of any error in fact was upon the firſt writ of error, and not having done it at that time the plaintiff is precluded. It has often been determined, that after an affirmance in the exchequer chamber of a judgment given in the court of king's bench, and a *remittitur* of the record into the king's bench, error *coram vobis* does not lie (*b*).

Mr. Strange, *on the other ſide*, cited *Salk.* 337. *Show.* 349. *Yelv.* 117. 1. *Roll. Abr.* 754. *pl.* 15.

The Court was clearly of opinion, that the allowance of a writ of error *coram vobis* was a matter of diſcretion in them, and not a *writ of right*; and that there could be no reaſon to allow this, it appearing upon the pleadings that this matter had been already determined by THE JURY, and was a matter proper for their determination.

Lee, *Juſtice*, cited 1. *Vent.* 207. 1. *Mod.* 285. *Carth.* 357. and the caſe of *Butler v. Muntamos*, 4. *Geo.* 2.

The writ of error was quaſhed.

(*a*) Eaſter Term 4. *Geo.* 2.

(*b*) 2. Lev. 38. 3. Keb. 28. and the caſe of Lambell *v.* Pretty John, Hilary Term, 12. *Geo.* 1.

Caſe 209. The King *againſt* The Mayor of Eveſham.

On a *mandamus* to proceed to the election of an alderman, the Court will not give any directions reſpecting the time of election; for that muſt be governed by the conſtitution of the city.—S. C. Stra. 949. S. C. Bar. K. B. 236. 265.

A MANDAMUS having been granted to the mayor of *Eveſham* to proceed to the election of an alderman,

Mr. Willes moved, that this Court would reſtrain the execution of this writ to ſome particular time, ſuggeſting that the corporation would proceed to an election in the abſence of ſeveral

members

The King *againſt* The Mayor of Eveſham.

members who were deſirous of being preſent at the time; that by the charter forty hours notice is required to be given of the intended election; that it is impoſſible ſeveral of the members, particularly *Sir John Ruſhout*, who was now engaged in parliament, could attend the election; that they deſired only ſome particular day might be agreed on for the election, to enable the abſent members to attend; and hoped this Court would interpoſe to prevent any ſurprize of this nature.

But THE COURT held clearly that *a mandamus* is a writ of right; that the Court has no power of preſcribing any time for the election; for if the election be made agreeably to the charter and according to law, it will be good though thoſe perſons did not attend: on the other hand, if there were any illegal ſurprize or other miſbehaviour in the corporation, in the manner of their proceeding to an election, then it might be proper to call in the aſſiſtance of this Court; but they could not preſume anything of this kind, or make any cautionary proviſion againſt it.

The motion was accordingly denied.

Gambier *againſt* Wright.

Caſe 210.

If a priſoner be removed from the *King's Bench priſon* to *the Fleet*, and eſcape, a declaration for ſuch eſcape need not ſhew proceſs againſt him in the common pleas.

THIS was A WRIT OF ERROR brought upon a judgment in the common pleas in debt for an eſcape. The declaration ſet out, that the plaintiff brought an action againſt a third perſon in the court of king's bench; that the party was arreſted thereon, and in cuſtody of THE MARSHAL; that by *habeas corpus* he was removed from thence, and upon return of the *habeas corpus* before MR. JUSTICE DENTON, was by him committed to the cuſtody of the defendant, THE WARDEN of the *Fleet*.

S. C. Stra. 951.
S. C. Bar. K. B. 257.
S. C. 2. Kely. 115.

HAWKINS, *Serjeant*, *for the plaintiff in error*, inſiſted, that it ought to appear there was ſome action depending in the court of common pleas, to warrant this removal by *habeas corpus* and commitment to THE FLEET, for otherwiſe it was a void commitment; the defendant in the action was never legally in cuſtody; and conſequently this is not ſuch an eſcape for which an action lies againſt the defendant. He cited 1. *Roll. Rep.* 217. *Cro. Car.* 223. 31. *Hen.* 6. 10. *Lut.* 1468. *Moor*, 278. 2. *Lev.* 84. 2. *Bulſt.* 62. 1. *Cro.* 877. 2. *Cro.* 394. 1. *Roll. Rep.* 276. *Salk.* 273. 700.

SECONDLY, The commitment is here to the defendant in his perſonal capacity, whereas it ought to be *priſone de la Fleet*, and ſo are all the precedents.

MR. DENNISON *on the other ſide*. The preſumption is, that the Judges of ſuperior courts have acted according to law, and therefore it muſt be intended that in this caſe there was a proper foundation for the commitment. It is not neceſſary to ſet forth the action in the record; the plaintiff in this caſe is a ſtranger to the proceedings in the

GAMMER *againſt* WRIGHT.

common pleas, upon which the removal by *habeas corpus* was grounded, and therefore they cannot be ſet out by him. There are numberleſs precedents for declaring in this manner. *Lev. Ent.* 56. *Vid.* 181. 294. 2. *Brownlow*, 13, 14. *Robinſon*, 307. *Lilly*, 157. 188.

As to THE SECOND OBJECTION, In point of reaſon there is no difference between a commitment to *the warden*, *&c.* or to *the Fleet*; there are likewiſe precedents of commitments in this manner, *Lilly's Entries*, 157. *Vid.* 194. *Robinſon*, 302. The ſtatute of the 8. & 9. *Will.* 3. c. 26. makes no difference of expreſſion between commitments to the marſhal of *the King's Bench* priſon, and warden of *the Fleet*; which ſhews the ſenſe of the Legiſlature to be, that there was no material difference: but beſides it is a ſettled principle of law, that all judgments, given by any court, are not void, but voidable only; and, if voidable only, the plaintiff cannot take advantage of that. *Carth.* 148. 5. *Mod.* 19. *Salk.* 272.

Judgment *niſi* for the defendant in error.

MICHAELMAS TERM,

The Seventh of George the Second,

IN

The King's Bench.

Philip *Lord* Hardwicke, *Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
William Lee, *Eſq.*
* * * * * *, *Attorney General.*
Charles Talbot, *Eſq. Solicitor General.*

Memorandum. Caſe 211.

THIS Term *Sir* PHILIP YORKE, *Knt.* was made Chief Juſtice of the Court of King's Bench, and created a Peer by the title of BARON HARDWICKE, of *Hardwicke*, in the county of *Glouceſter.*

Lord Hardwicke promoted.

The King *againſt* Taylor. Caſe 212.

AN INFORMATION in the nature of a *quo warranto* was granted againſt the defendant in *Hilary Term* laſt, to ſhew by what authority he acted as capital burgeſs of the borough of *Eveſham*; and in the information the uſurpation was laid to be from the twentieth day of *Auguſt* laſt, to the filing of the information.

The defendant, by his plea, admitted a uſurpation from the twentieth of *Auguſt* to the twenty-ninth of *September* laſt; and after having ſet out the conſtitution of the corporation he pleaded, that upon the twenty-ninth of *September* he was regularly elected into that office, and had ever ſince enjoyed the office under that election.

In an information *quo warranto*, if a uſurpation be confeſſed by the defendant for only part of the time laid in the declaration, a general judgment of *ouſter* is erroneous.

S. C. 2. Stra. 952.

S. C. 2. Kely. 272. S. C. 2. Bar. K. B. 238. 280. 316. 320, and the note. Show. 280. Cro. Jac. 260. 4. Mod. 58. 1. Salk. 374.

The King *againſt* Taylor.

To this there was a replication, and upon that four iſſues were taken:

The first issue was, That the defendant at the time of his election was not a burgeſs: and the charter requires the capital burgeſſes to be choſen out of the burgeſſes.

The second issue was, That the meeting, at which this election was made, was not duly ſummoned.

The third issue was, That the defendant was not duly elected.

The fourth issue was, That he was not duly ſworn.

The firſt and laſt iſſues were found for the defendant, and ſpecial verdicts on the two others.

A general judgment of *ouſter* was entered againſt the defendant; for as the defendant by his plea had confeſſed a uſurpation, that was taken to be the proper judgment.

Mr. Willes moved to ſet aſide this judgment, and inſiſted that if this general judgment of *ouſter* ſhould be permitted to ſtand, though the Court ſhould be of opinion for the defendant upon the ſpecial verdicts, or indeed if all the iſſues upon the trial had been for him, he could not have had any benefit thereof, for there cannot be two inconſiſtent judgments entered; one, that the defendant ſhall be ouſted; the other, and that he is acquitted of the uſurpation. The office of capital burgeſs in this caſe, which the defendant originally held by uſurpation, was determined by a regular election on the twenty-ninth of *September*; and there could be no *ouſter* of a thing not in being; and he cited the caſe of *The King v. Hicks (a)*, which was an information of this ſort; and the office there being determined at the time the party was convicted of the information, no judgment was entered, but only a *capiatur pro fine.* He compared it to the caſe of an ejectment, where if the term was declared on expire before the judgment is reverſed, there is no judgment entered for the recovery of the term, but for damages only; and it is for that reaſon application is uſually made to the Court for enlarging the term.

Chapple, *Serjeant*, *on the other ſide.* It appears by the defendant's confeſſion that there has been a uſurpation, therefore the crown is entitled to a judgment, and a general one only can be entered. The caſe of *The King v. Hicks* is not parallel; the perſon there not being in the poſſeſſion of the office at the time of the conviction. Theſe informations are in the nature of mixed actions, in which the poſſeſſor of the office is evicted, as well as a fine ſet upon him for the uſurpation. I admit that where ſuch an information is granted for claiming ſeveral franchiſes, the party may diſclaim as to one and be ouſted thereof, and acquit himſelf of any uſurpation as to the other. But no inſtance of any ſuch diſclaimer being allowed for part of the time laid in the information, can be given where it is one office only. The defendant, being in poſſeſſion of this office by uſurpation, was incapable of being regularly elected into it. The ſtatute 9. *Ann.* c. 20. ſ. 5. requires, that upon a conviction on this kind of information there ſhould be a judgment of *ouſter*, as well as a fine ſet on the party convicted.

(a) Hilary Term, 5. *Geo.* 1.

Mr. Hussey cited the caſe of *The King v. Pindar (a)*, where an information was granted againſt the defendant, to ſhew by what authority he claimed to act as mayor of the borough of *Penryn* in *Cornwall*; he juſtified by his plea, and ſet out that he was regularly elected into that office, and that he was duly ſworn; upon both theſe matters iſſue was taken; and upon the trial it was found, that he was regularly elected, but that he had never been ſworn; upon which a general judgment of *ouſter* was entered againſt him: afterwards the party, ſuppoſing himſelf not diſqualified by this judgment to execute his office for the future, provided he was duly ſworn, applied for a *mandamus* to be ſworn into it; to which this general judgment of *ouſter* was returned; and upon argument, the Court held the return ſufficient, for while this judgment ſubſiſted he could have no benefit from any ſuch *mandamus*; a writ of error was brought in THE HOUSE OF LORDS upon the judgment on the information, and likewiſe on the judgment of the Court upon the return to the *mandamus*, and the houſe of lords affirmed the judgment given below on the information, and quaſhed that on the *mandamus*, becauſe no ſuch writ lay.

Mr. Parker *on the ſame ſide.* To ſhew, that in entering up judgments the uſual terms muſt ſtrictly be complied with, he cited *Walcot's Caſe (b)*; and to ſhew that the judgment of *ouſter* is an eſſential part of the judgment in an information, he mentioned Lord Holt's opinion in the caſe of *The King v. Knollys (c)*.

Mr. Willes *in reply* ſaid, the *Caſe of Pindar* is very different from the preſent; there the defendant juſtified his exerciſe of the office for the whole time the information charged him to have uſurped; and it appearing that he never had been ſworn, but during the whole time had illegally exerciſed it, no other judgment could be given but that of a general judgment of *ouſter*. But here the juſtification not being an entire one for the whole time, but an admiſſion of a uſurpation until the twenty-ninth of *September*, and then a claim of it under a regular election, the party, indeed, is liable to be fined for having acted as a capital burgeſs until the twenty-ninth of *September*, but muſt be acquitted of any uſurpation for the reſidue of the time. The notion, that an illegal exerciſe of office for a time will lay the party under a perpetual diſability of being choſen in a regular manner, he ſaid, was repugnant to common ſenſe and reaſon, and not warranted by any legal reſolution. He inſiſted, that the caſe in ejectment, before put, was in point; becauſe, though the party was at

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(a) In the king's bench, 10. *Geo.* 1. 2. Ld. Ray. 1447.

(b) Salk. 632.

(c) Salk. 511. Skin. 514.

The King *againſt* Taylor.

time of trial in poſſeſſion of the office, yet it was under a regular election; and the intereſt which the party had in the office, as an uſurped one, and which he was liable to be ouſted of by an information of this ſort, was abſolutely expired and determined by the election on the twenty-ninth of *September*.

Mr. Fazakerly *on the ſame ſide*. By writs of *quo warranto* at common law, perſons illegally in poſſeſſion of offices which concern the public were liable to be ouſted; but then they were not puniſhable by fine. This introduced informations of this nature, in which the perſon convicted is to be fined. But in theſe informations it not being a ſettled point, whether, upon a conviction thereon, the party was liable to be ouſted, to ſatisfy this doubt the 9. *Ann.* c. 20. was made. The act of parliament only ſays, "that "upon ſuch convictions it ſhall and may be lawful for the Court to "award a judgment of *ouſter*, and likewiſe to ſet a fine;" and though the words, "it ſhall and may be lawful," ſhould be conſtrued compulſorily, and not to leave a diſcretion in the Court, as is contended for on the other ſide, yet the act muſt have a reaſonable conſtruction put upon it, and the proviſion for judgment of *ouſter*, *&c.* muſt be intended only where there is a continuing illegal poſſeſſion of the office, which is the common caſe, and not where the party is legally in poſſeſſion thereof, though poſſibly he may have uſurped originally.

6 Com. Dig. "Quo Warranto" (C.5.).

Mr. Draper, *on the ſame ſide*, as to the manner of pleading, cited, *Alton Wood's Caſe*, 2. *Hen.* 7. 11. 2. *Roll. Abr.* 124, 125.

The Court was clearly of opinion for the defendant, on the reaſons before mentioned, and ſet aſide the judgment.

Caſe 213.

The King *againſt* Carter.

The Court will not bail a man found guilty of *manſlaughter* by the coroner's inqueſt, if it appear thereon to be *murder*.

S. C. 2. Kely. 98. 159.

Mr. PARKER moved to admit the defendant to bail. The defendant was found guilty, on the coroner's inqueſt, of manſlaughter, though by the evidence ſet out on the inquiſition it appeared to be murder.

The Court held clearly they were not to be guided by the concluſion of the jury, but muſt judge themſelves upon the fact as ſet out; and though the party is found guilty of manſlaughter only before the coroner, he may afterwards be convicted of murder upon the trial before the petty jury.

It was agreed likewiſe, that the defendant could not by affidavit enter into any proof of his innocence; though as to any corruption, or miſbehaviour in the coroner or jury, he might.

And the motion was denied (*a*).

(*a*) See Rex *v.* Acton, 2. Stra. 851. Rex *v.* Dalton, 2. Stra. 911. Rex *v.* Magarth, 2. Stra. 1242. Rex *v.* Homer, Cald. 295. and 3. Hawk. P. C. 7th edit. ch. 15. ſ. 80. *notis.*

The Mayor of London *againſt* Sir Fiſher Tench. Caſe 214.

IN COVENANT the declaration recited an act of parliament, empowering the city of *London* to grant licences to any perſons for twenty-one years, to furniſh the city with convex lights for lighting the ſtreets of the city; it then ſet out a grant thereof made by the city to *Sir Samuel Garrard* and *Sir Fiſher Tench* for twenty-one years, reſerving a rent of four hundred pounds a-year, payable by them, "their executors, adminiſtrators, and "aſſigns;" and the breach aſſigned was, that *Sir Fiſher Tench*, who was the ſurvivor, had not paid the rent which was due at the Feaſt-day of *St. John Baptiſt* 1732.

In what caſe it is neceſſary to alledge an act done by a man or *his aſſigns.*

S. C. 2. Barn. 266. 5. Mod. 133. Stra. 228. Bull N. P. 164. 2. H. Bl. Rep. 133.

The defendant craved *oyer* of the indenture, and then demurred; and aſſigned for cauſe, that the declaration does not ſay, that the defendant "or his aſſigns" have not paid, &c.

MR. BOOTLE, *junior*. The diſtinction is, that where an act is to be done by a man and his aſſigns, there it muſt be averred, that neither he nor his aſſigns have done it; but it is otherwiſe where an act is to be done to a man and his aſſigns; and he cited *Salk.* 139.

LORD HARDWICKE, *Chief Juſtice*. The diſtinction in *Salkeld* is a pretty nice one, and ſeems hard to be maintained. Why ſhould the Court preſume an aſſignment? It ought, I think, rather to come on the other ſide; but however this defect, if any, is certainly ſupplied by the words "*hucuſque, &c.*"

MR. BOOTLE then took a ſecond objection. It appears by the indenture, as ſet out upon *oyer*, that the act impowers the city of *London* to make grants for one and one-and-twenty years, which is for twenty-two years, and the grant mentioned in the declaration is for twenty-one years only, which is a variance, and not purſuant to the power given by the act.

Conſtruction of the words of a deed.

MR. GERRARD *on the other ſide*. It is ſaid in the declaration, that the plaintiff *hucuſque habuit et gaviſus eſt* the grant, &c. which excludes any poſſibility of aſſignment to any other perſon, and therefore it is ſufficient to ſay the defendant has not paid.

LORD HARDWICKE, *Chief Juſtice*. If the city has a power to grant for twenty-two years, they certainly have a power to grant for twenty-one years, which is a leſs time, and ſo no variance at all.

THE COURT were all of the ſame opinion in both points.

LEE, *Juſtice*, cited 1. *Cro.* 235.

Judgment for the plaintiff (*a*).

(*a*) See Gyſe *v.* Ellis, 1. Stra. 227. Parſons' Caſe, 1. Keb. 440. Chalener *v.* Davis, 1. Lutw. 570.

Smith *againſt* Boucher and Others. Caſe 215.

AN ACTION of aſſault and impriſonment was brought againſt *the Judge* of the vice-chancellor's court at *Oxford*, *the*

To treſpaſs, the defendants juſtify under proceſs of the vice-chancellor's court at *Oxford*, founded on a cuſtom; to which the plaintiff replies, that no *affidavit* of the cauſe of action was filed, as required by 12. *Geo.* 1. c. . and judgment for the plaintiff.—S. C. 2. Stra. 993. S. C. B. R. H. 62. S. C. 2. Bar. 331. S. C. Cun. 89. 127.

SMITH *againſt* BOUCHER AND OTHERS.

plaintiff in the action, *the officer* who arreſted the now plaintiff, and *the gaoler.*

The defendants juſtified under *a proceſs* iſſuing out of the ſaid court of the vice-chancellor.

The juſtification ſet forth a cuſtom in the univerſity, eſtabliſhed among others by act of parliament in *Queen Elizabeth*'s reign, whereby the court is empowered, on complaint made by any perſon that he has cauſe of an action perſonal againſt another, and ſtating on oath the damage he has thereby received, and that he believes the perſon (againſt whom he has ſuch cauſe of action) will get out of the juriſdiction, to iſſue a writ to take and commit ſuch perſon to gaol, unleſs he finds bail, until the next court is holden: then the plea ſets out, that one of the defendants had received a cauſe of perſonal action againſt the plaintiff, which he made complaint of, &c. and that the damage he thereby ſuſtained was, in his eſtimation, to the amount of one thouſand pounds; and that he ſuſpected the plaintiff would make his eſcape out of the juriſdiction, and that he made oath *de et ſuper præmiſſis*, and ſo juſtifies the commitment to gaol.

The plaintiff replied, that no affidavit of the cauſe of action was filed, as is required by the 12. *Geo.* 1. c. . before any *capias* can iſſue.

To this there was a demurrer.

CHAPPLE, *Serjeant, for the defendants.* The replication is bad, becauſe the ſtatute does not make the proceſs void, but only inflicts a penalty on the officer, &c. for not complying with it: this appears from the penning of this and other acts of parliament, where the proceſs is expreſsly declared void when that was the intention of the law; ſo it is in the 5. *Geo.* 2. an explanatory act of the 12. *Geo.* 1.; 7. *Ann.* 12.; 13. *Car.* 2. c. 2. ſ. 2. This is not unlike the caſe where an officer, after an arreſt, refuſes to take bail, which does not make the officer a treſpaſſer. 3. *Cro.* 188. *Salmon v. Percival.*

HAWKINS, *Serjeant, on the other ſide.* The defendant's plea in this caſe is ill, and if ſo the plaintiff muſt have judgment, whatever becomes of the replication. There is in this caſe a mere nullity of juriſdiction, and the proceedings being void, all the defendants are treſpaſſers, like the caſe of an appeal in the common pleas (*a*). This is a void cuſtom; FIRST, Becauſe it does not appear when the court is to be holden, at which the writ upon which the party is arreſted is returnable (*b*). SECONDLY, Becauſe no *capias* can iſſue without a previous ſummons (*c*). Suppoſing it then a void cuſtom, it cannot be confirmed and made a good cuſtom by the ſtatute of *Elizabeth*, which in general terms only confirms the charters and cuſtoms of the univerſity, and muſt have a reaſonable conſtruction (*d*). But, however, the defendants

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(*a*) Moor, 275. Hale P. C. 35.

(*b*) Dyer, 175. pl. 23. 1. Cro. 467.

(*c*) 1. Roll. Abr. 563. pl. 11. 1. Mod. 236.

(*d*) Plowd. 399. Hob. 85, 86, 87. Co. Lit 38. Salk. 203.

dants have not brought themſelves within the cuſtom; there is no pretence of juriſdiction in the court, unleſs there is a cauſe of a perſonal action; now it is ſaid only, that the party complained he had ſuch cauſe, &c. not ſaying that he really had. The nature of the injury alſo which the party received ought to be particularly ſet out, that it may appear to the Court whether a perſonal action would lie for it, and not to make himſelf the judge thereof. It is ſaid the damage which the party received was in his eſtimation one thouſand pounds, which ought to be alledged more poſitively; and it is ſaid only, that the party made oath *de et ſuper præmiſſis*, which is altogether looſe and uncertain; and though this proceeding might not be looked upon as void with reſpect to *the officer* who executed the proceſs, yet with reſpect to the parties to the action it will (*a*). And all the defendants in this caſe having pleaded jointly, if the plea is bad as to one, it is as to all.

Chapple, *Serjeant*. We have ſet forth our caſe according to the cuſtom, and not in more general terms, and therefore this queſtion will depend upon the validity of the cuſtom: there are many cuſtoms in the city of *London* more extraordinary than this, which having the ſanction of the Legiſlature have never been ſhaken: A cuſtom for infants to bind themſelves apprentices; a creditor may arreſt for a debt not yet payable (*b*); houſes may be bought and ſold by parol and without enrolment, ſince the ſtatute of Enrolments (*c*); debts by ſimple contract are equal to ſpecialties; and many others of this nature (*d*).

Lord Hardwicke, *Chief Juſtice*. I was at firſt a little doubtful whether this was a caſe within the 12. *Geo.* 1. c. . It is no unuſual thing that affirmative laws ſhould not controul particular cuſtoms, as in the caſe of courts leet, when an uſage to hold them at different times than are preſcribed by ſtatute ſtill prevails. But I find here are negative words in the act which will controul any particular cuſtoms inconſiſtent with the proviſion of the act. Suppoſing this to be a caſe within the act, then the queſtion will be, Whether this non compliance with the direction of the 12. *Geo.* 1. will make the proceedings void? The Judge or the officer may be liable to an action for not purſuing the ſtatute, where a perſon has received a particular injury thereby; or if it is a thing that is injurious to the public, it is an offence indictable; but ſtill the proceedings in the action will not be affected by any ſuch miſbehaviour in the Judge or officer, and therefore the replication in this caſe is certainly ill.

As to the custom itſelf, we muſt be very tender in determining a queſtion of ſuch conſequence to the courts of both the Univerſities. The caſes which have been mentioned, of cuſtoms within the city of *London*, are very material. There does indeed ſeem to be ſome imperfections in that part of the defendants juſti-

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(*a*) 2. Jones, 290.

(*b*) 2. *Hen.* 4. 12.

(*c*) Dyer, 249.

(*d*) 5. Co. 82. 8. Co. 126.

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fication, by which they would bring themſelves within the cuſtom, as particularly that the party took an oath *de et ſuper præmiſſis*, the words implying no more than that the party took an oath relating to what is before mentioned. But then the nature of this action is conſiderable, and I cannot think any imperfection of that kind will make any of the parties to the proceedings treſpaſſers. The caſe of *Gwyn v. Poole* (*a*) is ſtrong to this purpoſe; where it ſeems ſettled, that although the cauſe of action ariſes out of the juriſdiction of the court in which the action is brought, yet neither the plaintiff, the Judge, nor the officer are treſpaſſers, or liable to any action of this nature.

Page and Probyn, *Juſtices*, were of the ſame opinion.

And Page, *Juſtice*, ſaid, he doubted of what was ſaid by Hawkins, that if the plea is bad as to one, it will be bad as to all; and put this caſe: Suppoſe treſpaſs and falſe impriſonment is brought againſt the plaintiff in a former action, and the officer and they join in a juſtification, under a judgment recovered againſt the now plaintiff; ſuppoſing in fact there is no judgment, the party to the action will fail in his juſtification, but not the officer, who has done no more than his duty in executing the proceſs directed to him.

Lee, *Juſtice*. The replication is certainly ill, for the reaſons that have been given; but it ſeems to me to be a conſiderable queſtion, Whether if the cuſtom, which ſeems to me to be a reaſonable one, be not purſued, the defendants will not thereby become treſpaſſers, as in the caſe of an appeal in the common pleas, before cited?

Lord Hardwicke, *Chief Juſtice*. In the caſe of an appeal brought in the common pleas, there the Court has no juriſdiction; but here there is a juriſdiction, though it is not ſtrictly purſued in all its circumſtances.

The caſe was adjourned, and afterwards argued a ſecond time.

Skinner, *Serjeant*, *for the defendants*. The replication is clearly ill; for the omiſſion in not filing the affidavit will not make the proceſs void.

Mr. Strange *for the plaintiff*. The plea is bad in this caſe. No ſummons appears before iſſuing the *capias*; the cuſtom is bad, yet if good it is not purſued; it is, that the party is to make oath he has a perſonal action, but poſſibly no cauſe of action. This cuſtom makes the perſon a judge what is a perſonal action, which is matter of law, and proper for the Court. It gives the plaintiff a power of ſettling the *quantum* the bail is to be taken for; which holds in caſes of contracts only, not in treſpaſs, or where the damage is uncertain; for there it is in the diſcretion of the Court,

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(*a*) 2. Lutw. 935. 1560.

and the *quantum* to be ſettled by a Judge. The apprehenſion or belief of the plaintiff that the defendant will withdraw himſelf, is not a ſufficient foundation to deprive a man of his liberty; a writ of *ne exeat regnum* is not obtainable on ſuch a ſuggeſtion. By this cuſtom, the Court is at liberty to proceed either according to the law of the land, or the cuſtoms and ſtatutes of the univerſity; which cuſtom is uncertain and bad, for ſome certain method of proceeding muſt be obſerved. The complaint may be made to one perſon, the oath adminiſtered by another; the complaint may be before the chancellor, his commiſſary, or deputy, but the oath before his commiſſary or deputy, which is a different perſon, and who does not appear to have any authority to adminiſter it. However, the cuſtom is not purſued. The cuſtom is, that the party believes he will withdraw, &c.; and it is ſaid only here, the plaintiff ſuſpected, &c. Belief muſt be founded on ſome certainty, ſuſpicion on ſlight circumſtances. Here is no oath of one thouſand pounds damage, but it is only ſaid ſo much in his eſtimation, which is too looſe, and not warranted by the cuſtom. The oath is ſaid to be made only "of or upon the truth of the premiſes:" though the premiſes be falſe, yet the party may ſafely ſwear "of or upon, &c." In the caſe of *The Queen v. Green (a)*, on a conviction for ſelling bread, &c. it was ſaid, that oath was made *de veritate præmiſſorum*, and it was held ill. In *The Queen v. Gray*, *Eaſter Term*, 13. *Anne*, *præſtitit ſacramentum de veritate præmiſſorum materiarum infra content.* held ill. The court, by the cuſtom, is to be held every *Friday*, but this court appears to have been held the ſeventh of *Auguſt* 1731, which was upon a *Saturday*. This Court will take notice of the calendar. In the caſe of *Hoyle v. Lord Cornwallis*, which was, Error on a judgment in the common pleas; a writ of enquiry was laid to be executed on the fifteenth of *June*, which was on a *Sunday*; which was wrong by the ſtatute of *Charles the Second*, it appearing to be ſo by looking into the calendar; judgment was reverſed. By the cuſtom, the court is to be holden within the precincts of the univerſity; but this court does not appear to have been ſo holden. All the defendants having joined in pleading, if the plea is bad as to one, it will be ſo as to all. Though the oath does not appear to the bailiff or gaoler, yet they are not excuſable in this action, unleſs they had ſevered in their plea. In the caſe of *Gwynn v. Poole*, the reaſon the Court went upon there was, the preſumed ignorance of the place where the cauſe of action aroſe. There can be no ſuch pretence here; they cannot be unacquainted with their own cuſtoms. In 1. *Vent.* 220. it is ſaid, that there can be no juſtification under the proceſs of an inferior juriſdiction, unleſs it can be ſhewn to be regular.

Per Curiam. That caſe is not law. In the caſe of *Phillips v Byron (b)*, Treſpaſs was brought againſt two defendants, who juſtified under a judgment which was afterwards ſet aſide for irregularity,

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(a) Hilary Term, 10. *Anne.*

(b) Hilary Term, 8. *Geo.* 1.

regularity, and held no good plea as to *the plaintiff*, though it would be as to *the officer*; but he having joined in pleading, it is bad as to both. 1. *Saund.* 28.

Skinner, *Serjeant*, *è contra*. This is a court founded on immemorial uſage, letters patents, and acts of parliament. The defendant comes before the chancellor, and ſwears, that he has an action of damage and injury which he computes at one thouſand pounds, which is only more modeſt than the common method. The plaintiff's apprehenſion of the defendant's withdrawing himſelf is good within the cuſtom. The chancellor's election of proceeding by our law or the cuſtom and ſtatutes of the univerſity is well warranted by the letters patents, confirmed by act of parliament. The making oath before the chancellor, his commiſſary, or deputy, that muſt be underſtood deputy of the chancellor, not of the commiſſary. This cuſtom thus eſtabliſhed is good (*a*). The words *of and upon the truth of the premiſes in manner aforeſaid*, refer to what went before, and is the ſame thing as if repeated. The party, by the cuſtom, is not obliged to ſhew the reaſon of his belief; ſuſpicion is a degree of belief. It is objected, that no poſitive oath is made of one thouſand pounds, &c.; though it had been poſitive, it muſt have been according to his eſtimation. I admit the warrant was not on a court day, nor is there any neceſſity for it within the cuſtom. As to the objection, that it is not ſaid *within the precincts*, *&c.*; I anſwer, that it is ſaid *according to the cuſtom*, which neceſſarily implies it. An action lies not againſt a Judge; 2. Lutw. 1560.
though againſt him, not againſt his officer, 1. Levinz, 95.

Lord Hardwicke, *Chief Juſtice*. There are two general points. First, As to the cuſtom. The privileges of the univerſity are to be ſupported as far as the law of the land will permit. The judgment here will not affect this cuſtom of the univerſity. "Perſonal action" and "cauſe of action" is the ſame thing. The definition of action in the civil law is the right of ſuing, or *jus proſequendi*. As to the objection, that the party is to ſwear poſitively, the party is to ſwear according to his apprehenſion, and that is the foundation of the proceſs. It is ſaid, it puts it in the power of the plaintiff to ſettle the *quantum* of the bail: that is ſtill ſubject to the power of the Judge, and the oath is in eaſe of the defendant. It is objected alſo, that the cuſtom giving the alternative of proceeding either by the common law or by the cuſtom and ſtatutes of the univerſity, there is not only a charter for it, but it is confirmed by act of parliament; the charter ſingly would not make it good, for the crown cannot erect a new court contrary to the laws of the land. It is alſo objected, that different perſons are to award the warrant and adminiſter the oath: the commiſſary might have a deputy. We take notice of the proceedings of the civil law; and a commiſſary may make a ſurrogate, who is in the nature of a deputy.

The difficulty is on the second point, Whether the defendants have brought themſelves within the cuſtom? Suſpecting is

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(*a*) Co. Lit 9. Cro. Car. 259. Cro. Jac. 80.

SMITH *againſt* BOUCHER AND OTHERS

not believing; ſaying he ſuſpects would not be well; but ſwearing according to his eſtimation is ſufficient. Saying only, "of and upon "the premiſes," is a very ſtrong objection, and is always fatal upon a conviction, where the party muſt ſwear the particulars. The words *in manner aforeſaid* do not ſeem to refer to the cuſtom; but it is ſaid before, that the defendant offered to take oath "of and upon the truth "of the premiſes, according to his belief:" but it does not appear what that was; whether the fact was true or falſe. There is nothing in the objection of not iſſuing the proceſs in court or any day certain. The only objections which ſeem material are, ſaying only that the party ſuſpected, and *de et ſuper veritat. præmiſſorum*. The queſtion then will be, If this is a good juſtification as to any of the defendants, though the cuſtom be not purſued? If the beadles and gaoler had ſevered in pleading, they had been excuſed. It can hardly be maintained under the authority of *Gwynn v. Poole*, that the Judge and plaintiff are not liable to an action, as they muſt be preſumed conuſant of the cuſtom. POWELL, *Juſtice*, there ſays, he doubted whether an action would not lie for ſuing in an inferior court, where the cauſe of action aroſe out of the juriſdiction.

PAGE, *Juſtice*. It does not appear that the commitment was to a priſon within their juriſdiction; it is to the county gaol; and it is not reaſonable that the party ſhould be committed to any other place. If the caſe is not brought within the cuſtom, it is the ſame thing as if there were no cuſtom at all. I agree to the difference in reſpect of an action lying or not between the party and officer. If the plea is bad as to one, it muſt be ſo as to all.

PROBYN, *Juſtice*. The cuſtom is not well purſued. But as to the objection reſpecting the commitment, here is an averment of the plaintiff's commitment to the place where they uſed to commit; and that is ſufficient.

LEE, *Juſtice*. All the defendants are in the ſame condition, as they have joined in pleading. The principal point is, Whether an action will lie againſt the Judge and the party? They cannot be ſuppoſed to be ignorant of the cuſtom; and therefore this will not claſh with the doctrines in the caſe of *Gwynn v. Poole*. What has been done is void, and ſo the parties are treſpaſſers. *Hob.* 63.

This caſe was adjourned for another argument on that laſt point only.

Mich. 8. *Geo.* 2.

MR. DENNISON *for the defendant*. As to the objection to the word "ſuſpect," that is ſupplied by the words of the plea following, "nor would the ſaid *A. B.* (meaning the defendant in the "action below), legally appear, if he was cited, according to his "belief, but rather run away."

LORD HARDWICKE, *Chief Juſtice*. That is not an independent member of the ſentence; but the word "ſuſpect" muſt, in conſtruction, run through the whole ſentence.

MR. DENNISON. The queſtion then is, Whether, though the affidavit is not made purſuant to the cuſtom, this action will lie againſt the defendants? It appears, that the place, the perſon, and

Smith *againſt* Boucher and Others.

the cauſe of action were within the juriſdiction ; therefore the iſſuing this warrant without a proper oath is not a void proceeding, but an erroneous one only (*a*). The proceſs, indeed, muſt be warranted according to the courſe of the court, as in *Hob.* 63. where it is held, that it is treſpaſs to take a perſon on a verbal command from a Judge, where the cuſtom is to iſſue a precept in writing. In that caſe, there was no juriſdiction as to any ſuch proceſs ; but here there was no defect of juriſdiction as to the warrant, but only an irregularity in awarding it without a previous oath. In *Roycroft* v. *Colecroft* (*b*), Treſpaſs and falſe impriſonment againſt the deputy-recorder of *Grantham* ; juſtification under the proceſs of the court ; reply, that no affidavit of the cauſe of action, according to the late act, was filed previous to the iſſuing the writ ; on demurrer thereto held, that the action would not lie. A ſpecial action on the caſe is a proper remedy ; here *the officer* is poſſibly not liable, if he had pleaded ſeparately ; but with regard to *the Judge* and *the plaintiff* in the action below, it is clearly otherwiſe. In the caſe of an execution, *the officer* may juſtify under the writ, *the party* muſt ſet out the judgment (*c*). In *Phillips* v. *Byron* (*d*), Treſpaſs againſt the plaintiff in the action and the officer, for an execution on a judgment ſet aſide before that time ; it was held clearly, that the action lay againſt *the party*, and *the officer* having joined in the ſame plea could not diſcharge himſelf. Treſpaſs lies in all caſes where the act done is in itſelf injurious ; actions on the caſe only where it is injurious in its conſequences. The caſe in *Hob.* 63. is in point.

The Court was unanimous, that the principal caſe was not diſtinguiſhable from *Hob.* 63.

Judgment for the plaintiff.

Lord Hardwicke ſaid, that the defendants having all joined in one plea, it was ſufficient if one of them was liable to the action, as the plaintiff below clearly was ; and though it was not neceſſary to determine whether the Judge was liable to it, yet, he ſaid, he was of opinion, that he was, who cannot but be preſumed conuſant of his own method of proceeding.

Judgment for the plaintiff.

(*a*) 19. Co. 76. 1. Vent. 263.

(*b*) In the court of common pleas, 1728.

(*c*) 2. Lutw. 1568. Salk. 408.

(*d*) Hilary Term. 8. *Geo.* 1. 1. Stra. 509.—See alſo Parſons *v.* Lloyd, 2. Black. 845. Perkins *v.* Proctor, 2. Wilſ. 382.

Caſe 216. Thomas *againſt* Biſhop.

If a bill of e change be drawn on the clerk of a public company, and he accepts it in his own name, without ſaying "for the Company," he is perſonally liable ; for the fact of its having been drawn and accepted on account of the Company cannot be explained by any extrinſic circumſtances, as the letter of advice, &c.—S. C. 2. Stra. 956, S. C. 2. Bar. K. B. 320. 335. S. C. 2. Kely. 136. S. C. B. R. H. 1. Kyd on Bills, 86.

Upon a motion for a new trial for a miſdirection by Page, *Juſtice* (who tried the cauſe in *London*), to the jury. The caſe appeared to be : One *Mildmay*, a ſervant to the *York Build*-

ings Company in *Scotland*, drew a bill of exchange for two hundred pounds payable to *Somervile* or order, and the direction of it is, "To *John Biſhop*, caſhier of *the York Buildings Company*, in "*Wincheſter Street, London*;" and the concluſion of the bill was, "Place the ſame to the account of *the York Buildings Company*." At the ſame time, a letter was directed to the Company advertiſing them of this draft upon the defendant *Biſhop*. *Somervile* indorſed the note to the plaintiff, who applied to the defendant; who accepted it generally in his own name, not taking any notice of the Company.

THOMAS *againſt* BISHOP.

Upon the trial, PAGE, *Juſtice*, was of opinion that the defendant was chargeable with the payment of the money, and directed the jury accordingly, who found for the plaintiff.

MR. STRANGE *moved for a new trial*, and inſiſted, that there were many circumſtances in the caſe which would make it appear highly probable that the defendant accepted this bill of exchange, not *jure proprio*, but as a ſervant to the Company. As, firſt, the direction of the bill to him with that addition, *viz.* "caſhier, &c.;" the letter of advice from *Mildmay* to the Company relating to this bill; and the concluſion of the bill, *viz.* "place it to the account "of *the York Buildings Company*," and not to the account of the drawer, as in the other caſe: that theſe were ſuch circumſtances in favour of the defendant, that it ought at leaſt to have been ſubmitted to the jury as a matter of fact, whether the defendant accepted this bill in one capacity or the other.

DARNELL, *Sarjeant*. In what right the defendant accepted this bill is not to be referred to a jury. By this acceptance of it in his own name, and not as a ſervant to the Company, he is become chargeable with the payment of it. Any perſon may accept a bill, though not drawn on him, and ſo make himſelf liable.

STRANGE. I agree a ſtranger may accept, but then it muſt be for the honour of the drawer, and ſo expreſſed in the acceptance, in order to charge the drawer afterwards.

LORD HARDWICKE, *Chief Juſtice*. Bills of exchange are contracts of a particular nature, and they muſt appear in writing, and no extrinſic evidence ought to be admitted. The drawee of a bill can no otherwiſe accept than *ſecundum tenorem billæ*. There are, indeed, ſome caſes where the form of a bill of exchange is in ſome meaſure purſued; as by directing money to be paid to *A.* or order out of a peculiar ſtock; but then it being directed to be paid out of a particular fund, they are not bills of exchange, but operate only as appointments to pay money (*a*). What is added to *Biſhop*'s name is not material, being deſcriptive only; and the letter of advice is a private tranſaction between the drawer and drawee, and which

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(*a*) See Jocelyne *v.* Laſſerre, 2. Ld. Ray. 1362. Fort. 281. and Jenery *v.* Herle, 8. Mod. 265. 2. Ld. Ray. 1361. 1. Stra. 591.

Thomas *against* Bishop.

no other perſon can have any knowledge of. If any evidence to deſtroy the bill itſelf ſhould be allowed, it would be very dangerous for any one to take an indorſement, and would prevent the circulation of ſuch bills in a great meaſure.

The reſt of the Judges concurred, and the motion was denied (*a*).

(*a*) See Dawkes *v* Deloraine, 3. Wilſ. 207. S. C. 1. Black. Rep. 782. Banbery *v* Liſſett, 2. Stra. 1211. Haydock *v*. Lynch, 2. Ld Ray. 1563.

Caſe 217. Braſſey *againſt* Dawſon.

The collector of the land-tax is *a debtor* to the king for the money in his hand; and therefore if he become bankrupt, and the commiſſioners of the land tax diſtrain, the goods taken on diſtreſs cannot be recovered in trover by his aſſignees under the bankruptcy without tendering the ſum due to the king, although the warrant of diſtreſs iſſued ſubſequent to the act of bankruptcy, and the goods were not ſold under it until after the aſſignment.

S. C. 2. Stra. 978.
S. C. Cunn 65.
S. C. 3. Bar. K. B. 342. 382.
2. Shew. 480.

UPON A TRIAL before LORD RAYMOND, the point reſerved was this: The collector having received the land-tax committed an act of bankruptcy; the commiſſioners of the land-tax iſſued out a warrant of diſtreſs againſt him for ſuch money, after the time of an act of bankruptcy committed by him, and before the iſſuing of the commiſſion.

And the queſtion was, Whether an aſſignment of the bankrupt's effects will, by relation, veſt a property in the aſſignees from the time of the act of bankruptcy committed, and ſo overreach the intermediate diſtreſs (*a*)?

SERJEANT DARNELL *for the plaintiffs*, who were the aſſignees, cited the caſe of *Andrews v. Sir Matthew Decker* (*b*), tried before EYRE, *Chief Juſtice*, *Eaſter Term*, in the third year of *George the Second*. The action there was brought againſt the defendant, as ſheriff, for a falſe return of *nulla bona* to a *fieri facias*; and the defendant in that caſe proving the perſon againſt whom the *fieri facias* iſſued had committed an act of bankruptcy, THE CHIEF JUSTICE held, *nulla bona* was a proper return, the party after the bankruptcy not having any property in the goods.

EYRE, *Serjeant*, *on the other ſide*. This muſt be conſidered as a debt due to the crown, and the prerogative will prevail againſt common perſons (*c*). No property veſts in the aſſignees until aſſignment; for the bankrupt's intereſt in his goods continues after the bankruptcy committed, and they are liable to be taken in execution for his debts.

DARNELL, *Serjeant*. I agree that no property veſted in the aſſignees until the aſſignment; but ſtill it is diveſted out of the bankrupt. It is like the caſe of adminiſtrators, who, by relation, have a property in their inteſtate's goods from the time of his death, and in the mean time they are in the cuſtody of the law,

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(*a*) The act of bankruptcy was committed on the 7th of *July* 1731; the commiſſioners of the land-tax iſſued the warrant of diſtreſs, and the goods were ſeized thereon on the 16th of *July*; the commiſſion of bankruptcy iſſued the 17th of *July*; the bankrupt's eſtate was aſſigned to the aſſignees on the 19th of *July*; and on the 22d of *July* the defendants took away the goods, and ſold them under the warrant of diſtreſs. S. C. 2. Stra. 978.

(*b*) Cun. Rep. 65.

(*c*) 3. Keb. 14. 1. Jones, 203.

Lord Hardwicke, *Chief Juſtice.* There are two points: **first**, Conſidering this as the caſe of a private perſon; and, **ſecondly**, as the caſe of the crown.

As to **the first**, Though the property is not actually diveſted out of the bankrupt until aſſignment, yet when that is done, it relates to the time of the bankruptcy committed, ſo as to avoid all intermediate acts done by the bankrupts themſelves, but not with reſpect to ſtrangers, when the execution, &c. at the ſuit of any other perſon is completely executed; though where the goods are in the ſheriff's hands, and the execution is not completed, it may be otherwiſe: as the preſent caſe is, the goods are in the hands of the conſtable, and therefore the aſſignment in this caſe may prevail againſt the diſtreſs.

But conſidering this as an execution at the ſuit of the crown, it ſeems otherwiſe; and this is a prerogative caſe, for it is a debt owing to the crown for the uſe of the public. Suppoſe the act had granted this money to the crown without giving any particular remedy for the recovery of it, *an extent* from the exchequer might certainly have iſſued; and the giving a ſummary remedy for the recovery of it cannot alter the nature of the debt. In the caſe of *an extent*, the goods are bound from the *teſte*. The king not being within the ſtatute of Frauds, &c. the relation of a property in the aſſignees to the time of the bankruptcy committed cannot prevail in this caſe, becauſe the king cannot now come in as a creditor, and ſo a wrong would be done by relation, which is always to be avoided.

Lee, *Juſtice*, cited **Holt**'s opinion, *Salk.* 111.

This caſe was now adjourned, and argued again in *Hilary Term*, in the ſeventh year of *George the Second*, as follows.

Mr. Strange *for the plaintiff.* The collector of the land-tax, on the ſeventh of *July* 1731, became a bankrupt; on the ſixteenth, the commiſſioners of the land-tax iſſue their warrant to levy the public money he had in his hands, according to the direction of the land-tax acts in ſuch caſes; and the ſame day the bankrupt's goods are ſeized upon ſuch warrant. A commiſſion of bankruptcy is taken out on the ſeventeenth; the aſſignment made the twenty-firſt; the goods taken away on the twenty-ſecond; and ſold on the ſixth of *Auguſt*.

I ſhall conſider this caſe in two different views:

First, Suppoſing it to be between private perſons; **ſecondly**, as it is in the caſe of the crown. It appears by the 3. *Geo.* 2. c. 25. being the Land Tax Act for the year when this matter happened, that the goods of the collector ſo to be ſeized by the warrant of the commiſſioners muſt be, not what he has in his cuſtody, but what he has a property in at that time. The property was diveſted out of the bankrupt in this caſe on the ſeventh of *July*, the day the bankruptcy was committed, with reſpect to all perſons except the crown, and then not until the aſſignment made. This appears likewiſe by the words of the 1. *Jac.* 1. c. . "That the "goods of the bankrupt ſhall be diſtributed whereof no execution "is ſerved and executed before the act of bankruptcy committed." This ſeems clearly to be admitted to be law in 3. *Lev.* 69. 191. In the caſe of *Huſſey v. Fiddel* (*a*) it was held, that the aſſignees, &c. might either bring trover for goods ſold by perſons after an act of bankruptcy committed, and before commiſſion, or might bring an action for the money, allowing the ſale good. If the bankrupt had any property, in ſuch caſe the ſale to an honeſt purchaſer might at all events be good, which by that authority appears to be otherwiſe; for the aſſignees may either diſallow the ſale, or conſider the bankrupt as their ſervant, and ſo bring an action for the money for the goods ſold by him acting in that capacity under them. It is ſufficient, however, for us if the property be *in abeyance*, like the goods of an inteſtate when there is a conteſted adminiſtration; for if they are not in the bankrupt, they are not ſubject to this execution within the act.

As to THE SECOND POINT, Whether this warrant be equivalent to *an extent* for the king's debt, it will be againſt us, it being before aſſignment. But the collector here is not to be conſidered as a debtor of the crown; it is the receiver only which is anſwerable to the crown. The receiver-general is appointed by the crown, the collector by the diviſion; and no payment to the collector is a diſcharge of the diviſion, by the expreſs words of the act; which is a very ſtrong proof that he is not looked upon as a ſervant of the crown. And there is no danger in this caſe that the crown can ſuffer, there being a proviſion in the act for reaſſeſſments on the diviſion in ſuch caſes. Suppoſing the crown has a power of proceeding againſt the collector in this caſe as its ſervant, yet this remedy by warrant is not equivalent or entitled to the ſame privileges as an extent. An extent is a common-law proceſs, a matter of record, and, in the caſe of the crown, binds from *the teſte*, the king not being within the ſtatute of Frauds, &c. The warrant here is a matter *in pais*; and can it be imagined, if the act had intended the crown ſhould have a remedy in this caſe againſt the collector, as their ſervant, the method of proceeding by extent would not have been mentioned, or at leaſt, in giving this remedy by warrant, declared, that it ſhould be equally advantageous to the crown? This method, therefore, ſeems to be deſigned merely for the advantage of the diviſion, who were liable to make good any ſuch deficiency, that they might get what they could from the collector in this ſummary way, and not that every inhabitant ſhould be under a neceſſity of bringing an action to recover their ſeveral ſums ſo paid to the collector.

THE COURT conceiving this to be a caſe of importance, took time to conſider it until *Trinity Term*, in the ſeventh and eighth years of *George the Second*; when

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(*a*) 12. *Will.* 3. 12. *Mod.* 324. Holt, 95. 3. Salk. 59.

Brassey *against* Dawson.

Lord Hardwicke, *Chief Juſtice*, gave the reſolution of the Court to this purpoſe.

The general queſtion is, Whether, by the aſſignment, the property in the bankrupt's goods paſſed to the aſſignees at the time of the bankruptcy committed? And we are all of opinion it did not. Two points have been made in the argument of this caſe.

First, Suppoſing this to be an execution at the ſuit of a private perſon, the aſſignees would have been entitled. This depends on the conſtruction which the ſtatutes of 13. *Eliz.* c. 7. and 21. *Jac.* 1. c. 19. have received. The conſtruction has been, that no intereſt in the bankrupt's effects is veſted in the commiſſioners, but a power only of making an aſſignment, 2. *Jones*, 196.; and that where the commiſſioners have once executed that authority, the property is, by relation, veſted in the aſſignees from the time of the bankruptcy committed. It was ruled by Holt, *Chief Juſtice*, in the caſe of *Cole v. Davies (a)*, that where execution is executed, and afterwards the defendant becomes a bankrupt, that the ſubſequent bankruptcy will not affect the execution; otherwiſe if it were executed after the bankruptcy committed. The delivery of the writ to the ſheriff, without an actual execution thereon, before the act of bankruptcy, is no bar againſt the aſſignees (*b*). This is better explained by Holt, *Chief Juſtice*, in the caſe of *Kiggil v. Player* (*c*). But yet, until the aſſignment is made, the property is not in the commiſſioners, nor is it in abeyance, but it is in the bankrupt himſelf.

The second point is moſt material in this caſe. And first, It is to be conſidered, whether the bankrupt, in reſpect of the ſum which he had collected and had in his hands, was a debtor to the crown. Secondly, What was the effect of the ſeizure under the warrant of the commiſſioners.

As to the first ſeveral objections are made. First, That the collector is not an officer of the crown; that the receiver is the only debtor to the king. It is ſaid likewiſe, that the diviſion is the debtor, and the collector a debtor to them only. This queſtion depends on the Land Tax Act of 3. *Geo.* 2. By that act, the duty is granted to the king, and the ſubſequent clauſes relate only to the manner of its collection. The collector appointed by the commiſſioners is paid his ſalary out of the money collected, on payment to the receiver; who is expreſsly diſcharged againſt the king, &c.; and the diviſion is only in the nature of a ſurety for the collector.

Secondly, As to what is the effect of the ſeizure under the warrant of the commiſſioners, it muſt be agreed, if this had been *an extent*, it would prevail againſt the aſſignees. But this warrant, it is ſaid, is a mere act *in pais*, and not to be compared to an extent. To be ſure, it is not of equal force, ſo as to bind from

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(*a*) Hilary Term, 10. *Will.* 3. 1. Ld. Ray. 724.

(*b*) 3. Lev. 69. 191.

(*c*) 1. Salk. 111.

Braſſey *againſt* Dawson.

the date, &c. but it is plainly deſigned by that act in imitation of that remedy. The point we go upon is, that before the aſſignment here was an actual ſeizure for a debt incurred to the crown before the bankruptcy, and thereby ſuch a lien on the bankrupt's goods as could not be defeated by the ſubſequent aſſignment; and that for three reaſons: The first, Becauſe theſe goods were properly ſeizable, being the goods of the bankrupt at that time, as appears by *Salk.* 108. 111. The second, The king is not bound by the ſtatutes concerning bankrupts, not being mentioned therein (*a*). It is certain, that in the caſe of the king the extent binds from the date, which would not be ſo if the king was included in thoſe acts, as appears by 3. *Lev.* 191. The word "extent" in thoſe acts relates only to private perſons; and this is farther illuſtrated by the clauſe in 21. *Jac.* 1. c. 19. ſ. 10. relating to *extents in aid.* Extents in caſe of the crown before aſſignment are good (*b*). But it may be ſaid, why ſhould the king be any more bound by the aſſignment than the bankruptcy? Becauſe by the aſſignment there is a property actually inveſted in others, which cannot be diveſted even in the caſe of the crown. The third reason is, that the king is never affected by relation (*c*). This relation here is founded upon the conſtruction of the ſtatutes relating to bankruptcy, in which the king is not included. But it is ſaid, if this ſhould prevail, the king, by a debt contracted ſince the bankruptcy, may defeat the creditors of all their juſt debts. But in anſwer to this, in the firſt place, fraud is not to be preſumed in the crown; ſecondly, this would be the act of the bankrupt himſelf after the bankruptcy committed, and he then can do no act injurious to his creditors. *Salk.* 108. Creditors are not hurt by the bankrupt's outlawry.

Another objection was, that no ſale was made of the goods, in purſuance of the ſeizure, until after the aſſignment. As to that, from the time of the ſeizure the goods were *in cuſtodiâ legis*, and not liable to any other demand until the money for which they were ſo ſeized was paid. But it has been held (*d*), that goods extended before any act of bankruptcy committed, and no *liberate* ſued out until after, yet were not aſſignable by the commiſſioners; which comes up to the preſent caſe, the act of bankruptcy being the ſame thing among private perſons who are creditors as the aſſignment in caſe of the crown.

Judgment for the defendant (*e*).

(*a*) 1. Jones, 202.

(*b*) 2. Show. 481.

(*c*) Hob. 339.

(*d*) Cro. Car. 148. 1. Jones, 202.

(*e*) See the Attorney-General *v.* Capell, 2. Show. 480. Audley *v.* Halſey, W. Jones, 262. Rex *v.* Pixley, Bunb. 202. Upham *v.* Sumner, 2. Black. Rep. 1294. Lechmere *v.* Thorogood, 1. Show. 12. 3. Mod. 236. Rorke *v.* Dangrell, 4. Term Rep. 408.

Kent *againſt* Kent.

Caſe 218.

Exceptions on a writ of error to a judgment in *dower*.

WRIT OF ERROR of a judgment in dower given in the common pleas in *Ireland*, and affirmed in the king's bench there.

MR. STRANGE *for the plaintiff in error* took five exceptions.

S. C. B. R. H. 50.
S. C. 2. Barn. 357. 386. 441.
S. C. 2. Stra. 971.
S. C. Cun. 44.

FIRST, That the value of the dower and damages was given to the time of the judgment; and it appears upon the record, that the action was not brought until two years after her huſband's death, in which caſes damages are not recoverable (*a*).

SECONDLY, Sixpence damages and ſixpence coſts are given in the common pleas, and yet no judgment taken for either of them, nor any remitter of them on record.

THIRDLY, Upon the affirmance of the judgment in the king's bench in *Ireland*, three hundred pounds damages and coſts are given, according to 3. *Hen.* 7. c. 10. but not ſaid *occaſione dilationis executionis*, &c.

FOURTHLY, It appears by the record, that the writ of error in the king's bench in *Ireland* was firſt brought by two perſons who were defendants in the common pleas there; that one of them died, and afterwards a writ of error *coram vobis* was brought by the ſurvivor and the heir of the perſon ſo dying; and in the entry of the judgment in the king's bench, all the coſts and damages are awarded againſt the ſurvivor, whereas it ought to be againſt both.

FIFTHLY, The plaintiffs in the writ of error are amerced.

MR. PARKER, *in anſwer* to theſe ſeveral exceptions, ſaid,

AS to THE FIRST EXCEPTION, If the plaintiff in the writ of error would have any advantage of the time when this writ of dower was brought, the original writ ought to have been brought before the Court by *certiorari*, and no regard is to be had as to the time, as it appears by the recital under the memorandum, &c. Beſides, it appears in *Co. Lit.* 32. that if the defendant in a writ of dower would make advantage of the laches of the widow to bar her of her damages, he ought to inſiſt upon it in pleading by ſhewing he was always ready, &c.

AS to THE SECOND EXCEPTION, The ſixpence damages and ſixpence coſts are included in the ſum mentioned in the words *quæ in toto attingunt*, &c. upon the affirmance in the king's bench; but, however, this is a miſcomputation only, which will not be error. 1. *Jones*, 171. *Palm.* 510.

AS to THE THIRD EXCEPTION, No courts of juſtice are obliged to give the reaſon of their judgment, and therefore the

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(*a*) Co. 32.

words

Kent *againſt* Kent. words "*occaſione*, &c." not neceſſary; but, however, if that were ſo, yet this error in entering the damages and coſts will not affect the printed judgment in dower. *Sty.* 290. 7. *Mod.* 154.

As to THE FOURTH EXCEPTION, The heir of the perſon dying is joined for conformity, and the damages ſurvived againſt the other.

As to THE FIFTH EXCEPTION, An amerciament is a puniſhment by the Court for proſecuting without cauſe, which appears by the affirmance of the judgment to be the caſe here, and therefore very proper (*a*). However, this is cured by 16. & 17. *Car.* 2.

LORD HARDWICKE, *Chief Juſtice:* Both the anſwers given to THE FIRST EXCEPTION are good.

As to THE SECOND EXCEPTION, It appears by computation, that the ſixpence damages and ſixpence coſts are included, &c. However, that is ſuch a miſtake as may be ſet right at any time.

As to THE THIRD EXCEPTION, Though the precedents are *occaſione dilationis executionis*, yet the general rule is, that no Court is obliged to give the reaſon of their judgment. So it is in the caſe of juſtices, &c. But it appears here likewiſe, that the defendant in error has been delayed of her execution by the writ of error; which the Court will take notice of.

As to THE FOURTH EXCEPTION, The judgment for the damages and coſts being grounded on the ſtatute, and the principal judgment on the common law, it is reverſable *quoad* that part only. But I do not ſee how this can be aſſigned for error. The perſon againſt whom no damages are awarded cannot, becauſe it is for his benefit; and here both of them have joined in the writ of error.

As to THE FIFTH EXCEPTION, I never ſaw a *miſericordia* upon a writ of error. But this is aided by the 16. & 17. *Car.* 2.

At another day, LORD HARDWICKE, *Chief Juſtice*, ſaid he had looked into THE BOOKS, and found many precedents and caſes where things for the benefit of the party may be aſſigned for error; and cited 1. *Roll. Abr.* 759. *Yelv.* 107. 8. *Co. Becher's Caſe*; and therefore deſired that point only might be ſpoke to again.

LEE, *Juſtice*, cited 4. *Leonard*, 6. to the ſame purpoſe.

In *Hilary Term*, in the ſeventh year of *George the Second*; this ſingle point was argued, *viz.* Whether the judgment was right in awarding the damages againſt the ſurviving plaintiff in error only?

LORD HARDWICKE, *Chief Juſtice*, gave the reſolution of the Court. There are three queſtions:

(*a*) 2. Saund. 226. Salk. 253.

Kent *againſt* Kent.

First, Whether the king's bench in *Ireland* ought to have given any judgment for the damages incurred ſince the firſt judgment obtained in the common pleas there?

Secondly, Whether they are regular in giving judgment for damages againſt the ſurvivor only?

Thirdly, Whether that can be now aſſigned for error by both, as it is for the advantage of the perſon not charged with damages?

As to the first, The Court ought to give judgment for the damages incurred ſince the firſt judgment; but that power is not given by the ſtatute of *Merton*, the proviſion there being only for the damages *à morte viri* to the time of the firſt judgment. The inconvenience widows were under in being kept out of their dower a long time, gave occaſion to that proviſion made in their favour by the 16. & 17. *Car.* 2. c. 8. ſ. 4. which directs a writ of enquiry to iſſue for the recovery of damages ſubſequent to the firſt judgment. This act was made an *Iriſh* law, by 17. & 18. *Car.* 2.

As to the second point, By this act, the other plaintiff in error is clearly liable to thoſe damages as much as the ſurvivor.

But there is a ſtronger objection to this judgment, which has not been mentioned at the Bar. It appears, that no writ of enquiry was awarded in this caſe, which ought to be, the ſtatute requiring ſuch judgment to be given for thoſe damages upon the return of the writ of enquiry. It may be objected, that the value of the lands recovered in dower, which is the meaſure of damages, is aſcertained by the verdict; and as it lies in computation only, the Court might do it without any inqueſt at all, as it is on the ſtatute of *Merton*, when the value of the lands recovered appears by the verdict, the Court gives judgment for the damages. But the ſtatute of *Merton* directs not any writ of enquiry to iſſue, and the manner of giving them is diſcretionary in the Court. *Raſtal*, 230. 2. *Saund.* 335. 1. *Lutw.* 719. 1. *Lev.* 92. The caſe, indeed, in 2. *Saund.* 335. ſeems to contradict this opinion; but it does not appear by the caſe that this point ever came in queſtion. Beſides, the damages there are not given *pro valore dotis*, but *pro dilatione executionis*, on the ſtatute of 3. *Hen.* 7. c. 10.

As to the third point, Both may properly join in this writ of error. It is true, in general, the rule is, that the party cannot aſſign for error anything beneficial to him; ſummons and ſeverance is the common practice in ſuch caſes (*a*). But that rule muſt be conſtrued with this reſtriction, that the party ſhall not aſſign for error any miſtake in proceſs, delay, &c. which is in his favour; otherwiſe it is where the fault lies in the judgment given by the Court (*b*).

(*a*) 1. Cro. 891. 1. And. 239. Yelv. 3.

(*b*) 8. Co. 59. 2. Saund. 45. Yelv. 107. 1. Roll. Abr. 759.

Kent *againſt* Kent.

There can be no doubt but that this judgment may be partly affirmed and partly reverſed (*a*), as part of it is grounded on common law, and part on ſtatute (*b*).

The question then will be, What judgment we are to give? The general rule is, that upon the reverſal of a judgment here, this Court is to give ſuch a judgment as the Court below ought to have given (*c*). But in this caſe we can give no judgment for theſe damages, but muſt remit the record to the king's bench in *Ireland*, requiring them to award a writ of enquiry to the ſheriff of *Kilkenny*, where the lands lie, and upon the return of that writ the Court there are to give judgment for the damages (*d*).

This caſe is not unlike proceedings in the exchequer-chamber, where they remit the record to this court to award execution (*e*).

Judgment therefore muſt be affirmed as to the recovery of dower, and the award of ſeiſin thereon, and reverſed as to the damages; and a mandate to iſſue to the court of king's bench in *Ireland* to award ſuch writ of enquiry.

(*a*) See Green *v.* Waller, 2. Ld. Ray. 891. Knox *v.* Coſtello, 3. Burr. 1791. Heath *v.* Chilton, 4. Burr. 2015. Hancock *v.* Haywood, 3. Term Rep. 435.

(*b*) 1. Salk. 24.

(*c*) Cro. Car. 442.

(*d*) Cro. Jac. 534. Cro. Car. 511, 512.

(*e*) Cro. Jac. 206. Carth. 280.

Caſe 219.

Gilmore *againſt* Horton.

The damages laid in the declaration are to be conſidered as the cauſe of action, and not thoſe found by the verdict.

See Tidd's Practice, 28. 121. 124. 179.

THIS and many other caſes of the ſame nature having been long depending for the judgment of the Court, where the damages laid in the declaration were more than ten pounds, and leſs found by verdict;

Lord Hardwicke, *Chief Juſtice*, now delivered the opinion of the Court in this manner: The principal argument that has been made uſe of in ſupport of ſuch proceedings is the hardſhip the ſuitor would be under if, in actions which lie in damages, the money found by the verdict to be due to the plaintiff ſhould be conſtrued to be the cauſe of action. And on the other ſide it is inſiſted, that if the damages laid in the declaration are to be taken to be the cauſe of action, the act will eaſily be evaded and rendered ineffectual. We are of opinion the damages laid in the declaration are the cauſe of action. If this matter reſted merely on the 5. *Geo.* 2. c. 27. it might be a very conſiderable queſtion, and ſome inconvenience might have attended a determination either way: though it ſeems, as it ſtands upon that act only, this would be the moſt proper conſtruction. The words "cauſe of action," in the 12. *Geo.* 1. c. 29. muſt mean the charge laid in the declaration; and that act being recited by the 5. *Geo.* 2. c. 27. is material in this caſe. In the clauſe of the 5. *Geo.* 2. c. 27. relating to ſpecial writs, the words "cauſe

" of action" muſt have this conſtruction, or otherwiſe attornies, &c. would be liable to penalties which it is not in their power to avoid. In pleading the ſtatute of Limitations to an executory contract, it is ſaid *cauſa actionis non accrevit*, &c. which muſt refer to the demand laid in the declaration. The ſtatute of *Glouceſter* has reſtrained the ſuperior courts from proceeding in actions under forty ſhillings (*a*). Lord Coke ſays (*b*); that clauſe has received this conſtruction, that it muſt appear by the count that the action is for leſs than forty ſhillings, and not by the verdict to bring the caſe under the reſtriction of that clauſe. In *Bro. Abr.* (*c*) it appears, that if in an action brought in a court baron or other inferior court, which cannot hold plea of actions above forty ſhillings, though above forty ſhillings is recovered, the plaintiff may remit what is more than forty ſhillings, and take judgment for the reſidue; which proves that the damages found by the verdict are not the rule to go by; for if ſo, it would appear by the verdict that the cauſe of action was ſuch of which the inferior court had no juriſdiction. But whatever doubt there might be on the 5. *Geo.* 2. c. 27. relating to the proceedings in *Wales*, that act was plainly intended to extend the ſame proviſions to *Wales*; and in that act the words are, " debt or damages declared on;" which, from the nature of the thing, muſt be intended to mean what in the other act is called " cauſe of action;" and this, therefore, is a parliamentary expoſition of what they mean by the expreſſion " cauſe of action."

(*a*) 2. Inſt. 310.—See alſo 3. Burr. 1592. Sayer Rep. 219. 240. 4. Term Rep. 495.

(*b*) 2. Inſt. 312.

(*c*) Bro. Abr. " Juriſdiction," pl. 40.

Moy *againſt* Oſborne.

Caſe 220.

DECLARATION in *Engliſh*. The damages were laid at twenty-five pounds; the verdict was for leſs than ten pounds.

S. C. 2. Barn. 268. 337.

Lord Hardwicke, *Chief Juſtice*. This muſt be bad for the ſame reaſons the former caſes were held good. The ſtatute of the 5. *Geo.* 2. c. 27. muſt be put out of the caſe, not extending to caſes where the damages laid in the declaration are above ten pounds; and it appears by *Cro. Eliz.* 85. that this is erroneous, and not aided by any of the ſtatutes of Jeofails.

The judgment was reverſed.

Webb *againſt* Dwight.

Caſe 221.

THE defendant had given a bond for two hundred pounds to the plaintiff, payable at certain inſtalments; and the day of the firſt inſtalment being paſſed, and the money not paid, the plaintiff brought debt on the bond, and had judgment for the penalty, and ſued out execution, and levied what was then due, together with the coſts of the ſuit; and before the ſecond inſtalment became

Debt lies on a bond payable by inſtalments, after non-payment of the firſt inſtalment; and the judgment ſhall ſtand as a ſecurity for the arrears.

Wise *against* **Dwight.**

became due, the plaintiff took out a ſecond execution for the reſidue, and levied it.

But THE COURT, on motion to ſet it aſide, ſaid, that there being a breach, the judgment for the penalty ſhould ſtand on a ſecurity, but that they would not ſuffer execution to be executed for more than what was regularly due; and therefore they ordered the money thus levied on the ſecond execution to be reſtored (*a*).

(*a*) That the penalty of a bond is, when forfeited, the legal debt, ſee The Bank v. Morris, 1. Stra. 1029. B. R. H. 819. 4. Bro. P. C. 287. Cotterel v. Hooke, Dougl 97.; and that if an annuity ſecured by bond be not paid on the day, the penalty is forfeited, Judd v. Evans, 6. Term Rep. 399.

HILARY

HILARY TERM,

The Seventh of George the Second,

IN

The King's Bench.

Philip *Lord* Hardwicke, *Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.*
William Lee, *Eſq.*
} *Juſtices.*
John Willes, *Eſq.* *Attorney General.*
Dudley Ryder, *Eſq.* *Solicitor General.*

The King *againſt* Hooker.

Caſe 222.

MR. HUSSEY moved for an information againſt the defendant for a cruel aſſault and battery committed on a perſon in *Newfoundland* (a).

An information will not lie for a battery in *Newfoundland*.

But the motion was denied, the offence being local, and the caſe of an information not diſtinguiſhable from that of an indictment.

(a) See Dowſon v. Mathews, 4. Term Rep. 503. that treſpaſs for breaking and entering the plaintiff's houſe in *Canada* will not lie in this country.

The King *againſt* Halford.

Caſe 223.

UPON ſhewing cauſe why an information ſhould not go againſt the defendant, late mayor of the borough of *Eveſham*, for not holding the borough ſeſſions and courts of record for the borough weekly, according to the direction of THE CHARTER;

The Court will not grant an information againſt A MAYOR for neglecting to hold *a ſeſſions*, unleſs the neglect was wilful and corrupt. 4. Burr. 1999.

LORD HARDWICKE, *Chief Juſtice*, ſaid, he could never conſent to grant ſuch informations, unleſs it appeared that ſuch neglect was wilfully committed, in delay of juſtice, and oppreſſion of the ſubject (*a*); and that a contrary practice would ſubject almoſt all the mayors or other chief officers of corporations through all the kingdom to ſuch a puniſhment, who, it is well known, do not, nor indeed is there any occaſion to, hold courts as often as by their charter they are impowered to do.

Hawkins, *Serjeant, on the other ſide*, inſiſted, that though it did not appear in this caſe that there were any particular perſons who ſuffered by the mayor's neglect of holding courts, and that might be a very proper defence againſt any action, yet this being a public office, any neglect therein, though not attended with any ſpecial damage, was puniſhable criminally; and he urged the common diſtinction, that private offices, ſuch as park-keeper, &c. were not forfeitable unleſs ſome injury was ſuſtained, but that in public offices it was otherwiſe.

Lord Hardwicke, *Chief Juſtice*, and Page, *Juſtice*, ſaid, that was not law; and that it was ſo determined in *Serjeant Whitaker's Caſe* (*b*), that a forfeiture of a public office could not be incurred without ſome ſpecial damage ſuſtained, any more than of a private one.

(*a*) See accord. Rex *v.* Young and Pitts, 1. Burr. 556. Rex *v.* Cox, 1. Burr. 785. Rex *v.* Palmer, 3. Burr. 1162. Rex *v.* Jackſon, 1. Term Rep. 653. Rex *v.* Holland, , Term Rep, 692.; and 3. Hawk. P. C. 7th edit, ch. 8. ſ. 74.

(*b*) S. C. under the title of Reg. *v.* Bailiffs of Ipſwich, 2. Salk. 435.

Caſe 224. The King *againſt* Pole.

If a charter fix the election of a mayor on a day certain, without any power to hold over, the poll cannot be adjourned.

S. C. B. R. H. 23. 47.
S. C. 2. Bar. 93. 447.
S. C. Cun. 11.
4. Burr. 2241.
2. Kyd on Corp. 44.

Upon a motion for an information in the nature of a *quo warranto* againſt the preſent *Mayor of Liverpool*,

The caſe appeared to be: By the charter, the mayor is to be elected on *St. Luke's Day*, being the eighteenth of *October*, and no proviſion made for holding over. Upon the eighteenth of *October* laſt the Corporation met, and proceeded to the election of a new mayor; but before the poll was ended, *Mr. Brereton*, the then mayor, adjourned the election to the day following, when *Pole* was elected by a majority of voices.

The objection taken to his election was, that there being no proviſion by the charter for the mayor to hold over, his office was determined on *St. Luke's Day*, and the proceeding to an election of the preſent mayor on the day following was irregular and void.

It was inſiſted, that this was a caſe not within the 11. *Geo.* 1. c. 4.; that the proviſion of that act is, "that where a mayor or other head "officer of a corporation wilfully abſents himſelf on ſuch election "days, he may proceed to an election the day following, or in his "default the ſenior alderman, &c. may:" but that act muſt be conſtrued where the firſt ſtep in the election is taken on the day after the charter-day; that what was done here on the ſecond day was no more than a continuation of the buſineſs begun the day before; and therefore this is not a regular election within the act.

The King *againſt* Pole.

The whole Court were clearly of opinion, that this was a void election at common law, for the reaſons before given.

Lord Hardwicke, *Chief Juſtice*, and two other Judges, were of opinion, likewiſe, that this was not a caſe within the act.

But Lee, *Juſtice*, ſeemed to think otherwiſe, the words of the act being "in order to and for the completing of ſuch election, &c."

The information was granted.

Comber *againſt* Hill.

Caſe 225.

UPON a special verdict in ejectment, found at the aſſizes in *Suſſex*, the caſe was this: *Richard Holden*, ſeiſed in fee, by his will, the eleventh of *March* 1698, deviſed the premiſes, after ſeveral preceding limitations which were ſpent, in this manner: "To my grandſon *Richard Holden*, ſon of my ſon "*Thomas*, deceaſed, and to *Elizabeth*, daughter of my ſon *Richard*, "to be equally divided between them, and to the heirs of their "reſpective bodies; and for default of ſuch iſſue, to my grand-"daughter *Anne Holden* in fee." The teſtator died ſeiſed the twenty-fifth of *March* 1699. Afterwards *Elizabeth* died without iſſue; the leſſor of the plaintiff claimed her moiety in right of *Anne* his wife; *Richard* claimed the whole as ſurvivor, upon a ſuppoſition that there were croſs-remainders created by the will.

In what caſe croſs remainders may be raiſed by implication.

S. C. 2. Stra. 969.
S. C. B. R. H. 22.
S. C. 2. Bar. K. B. 367. 443.
S. C. 2. Kely. 188.

Belfield, *Serjeant, for the defendant*, relied principally on the caſe of *Holmes* v. *Meynell* (*a*). He cited likewiſe 4. *Leon*. 14.

Darnell, *Serjeant, on the other ſide*. The caſe of *Holmes* v. *Meynell* is clearly diſtinguiſhable from the preſent caſe. There the deviſe was, "all my lands, &c. to my two daughters, &c. and in "caſe they happen to die without iſſue, then, &c." Great ſtreſs was there laid upon the words "*all*" and "*they*;" which raiſed a ſtrong implication, that the teſtator did not intend that he in remainder ſhould take any thing until both the daughters were dead without iſſue. There the deviſe was likewiſe to a nephew, a perſon not ſo nearly related as the firſt deviſees, who were his daughters; which is taken notice of in that caſe as a favourable circumſtance to create croſs remainders.

Lord Hardwicke, *Chief Juſtice*. The caſe of *Holmes* v. *Meynell* is a great authority, and will have its weight with the Court, unleſs it can be diſtinguiſhed materially from the principal caſe. There can be no doubt but *Richard* and *Elizabeth* were tenants in common in tail. Then the caſe will be the ſame as if

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(*a*) 2. Jones, 172.

Comber againſt Hill.

the teſtator had given one moiety to *Richard* and the heirs of his body, the other to *Elizabeth*, *&c.* And if the deviſe had been expreſſed in that manner, could the ſubſequent words, "in default "of ſuch iſſue," be taken in any other ſenſe than that in default of ſuch iſſue reſpectively the remainder over ſhould take place. The expreſſions in the caſe of *Holmes v. Meynell* are very different in the inſtances cited, which had great influence upon the Court in the reſolution upon that caſe. I deſire thoſe who are to argue next to endeavour to find a caſe where, after a tenancy in common in tail created, theſe ſubſequent words, "in default of ſuch iſſue," have ever been held to raiſe croſs remainders.

In *Eaſter Term* following, LORD HARDWICKE, *Chief Juſtice*, delivered the reſolution of the Court to this purpoſe: To raiſe croſs remainders in a will, one of theſe things is neceſſary, either expreſs words, or the plain and manifeſt intent of the teſtator. There are certainly no expreſs words; but it is contended, that the intent of the party appears to be ſuch by a neceſſary implication. The words relied on are, "in default of *ſuch* iſſue," and that the word "*ſuch*" muſt mean both *Richard* and *Elizabeth*. Theſe words may, in their natural ſenſe, be conſtrued either conjunctively or diſjunctively; upon that clauſe in the will the matter ſtands indifferent; but taking the whole will together, it ſeems clear there can be no croſs remainders. If it had been, "in default of "ſuch reſpective iſſue," or "in default reſpectively," there could be no queſtion in the caſe; and the word "*ſuch*" in this clauſe being a relative term, and referring manifeſtly to the preceding words "heirs of their reſpective bodies," it amounts to the ſame thing. The relation the three deviſees bore to the teſtator appears upon the face of the will; all of them his grandchildren; and wherever that has appeared, it has been made uſe of as a proper argument to direct what conſtruction is to be put upon the will. The caſe of *Holmes v. Meynell* is diſtinguiſhable from this both in reſpect of the words and the intention of the teſtator. The words there are, "if they die without iſſue." The conſtruction put upon the word "*they*" was if both of them, &c.: the word "reſpec-"tive" is wanting there; the firſt deviſees there were the teſtator's daughters, and he in remainder a nephew only, which great ſtreſs was laid upon. The ſame obſervation holds with regard to the other caſes cited, *Dyer*, 326. 333. 334. 4. *Leon.* 14.

Judgment for the plaintiff (*a*).

(*a*) See Gilbert *v.* Withy, Cro. Jac. 655. Holmes *v.* Willett, 1. Freem. 483. Twiſden *v.* Lock, Amb. 663. Phippad *v.* Mansfield, Cowp. 797. Wright *v.* Holford, Cowp. 38. Amb. 468. 6. Bro. P. C. 156. Burden *v.* Burralite, Dougl. 53. *notis.* Williams *v.* Brown, 2. Stra. 996. Davenport *v.* Oldys, 1. Atk. 579. Atherton *v.* Pye, 4. Term Rep. 710. Tanner *v.* Dorville, 5. Term Rep. 518.

The King *againſt* Griffin and Others. Caſe 226.

THE DEFENDANTS, churchwardens of the pariſh of *Lambeth*, having been convicted on an information tried at *Surrey* aſſizes for A LIBEL, in giving public notice in the church, thereby deſiring the pariſhioners to meet and aſſiſt them in correcting ſeveral abuſes which, by reaſon of the pretended authority of the truſtees appointed by the pariſh for the management of the workhouſe there, had been ſuffered to be committed;

A libel may be committed by churchwardens ſummoning the pariſh to correct pretended abuſes in the truſtees of the workhouſe; and the truſtees need not all be named.

S. C. 1. Seſſ. Caſes, 257.
S. C. 2. Barn. 368.

It was inſiſted on, among many other objections to the information, in arreſt of judgment,

FIRST, That this was no libel.

SECONDLY, That it is laid to be a libel on three perſons, whoſe names are particularly mentioned, *cæteriſque fiduciariis*, whereas the other truſtees ought to be ſpecially named, or otherwiſe the defendants will be ſubject to infinite proſecutions at the inſtance of the other truſtees ſeverally.

LORD HARDWICKE, *Chief Juſtice*. It cannot be taken upon this information, that this is a charge on the truſtees of any breach of public truſt, the erection of this workhouſe and the government thereof not appearing to be by act of parliament or any public authority, but a breach of a private truſt repoſed in them by the pariſhioners; and any ſuch charge is equally puniſhable as a libel.

As to THE SECOND OBJECTION, There are indeed authorities where, in caſes of libels upon perſons in their private capacities, it has been held neceſſary that ſome particular perſons ſhould be named as the ſubject of the libel. In the caſe of *the King v. Orm (a)*, there an information for a libel "on certain perſons unknown" was held ill; but this was never carried ſo far as to make it neceſſary that every perſon injured by ſuch libel ſhould be ſpecified. The omiſſion of *cæteri fiduciarii* in this caſe would have been immaterial, the charge of abuſes upon the three perſons ſpecified only being ſufficient to maintain the information. And there is no danger of ſubjecting the defendants to other proſecutions for this offence; the conviction on this information will be a ſufficient bar to any other, it being one ſingle offence, though every perſon injured by this libel might have an action againſt the defendants in regard to the ſeveral and ſpecial damage which each has ſuſtained.

Judgment for the king.

(a) 11. *Will.* 3. 1. Seſſ. Caſes, 160. c. 148.

Arthur

Caſe 227.

Arthur *againſt* Vanderplank.

Acceptance of rent may be pleaded in bar of *debt*, but not of *covenant*.

S. C. 2. Barn. 372.
S. C. 2. Kely. 167.
Vide Cro. Car. 188, &c.

COVENANT FOR RENT. The defendant pleaded an acceptance for rent from the aſſignee of the term by the leſſor, the plaintiff. To this there was a demurrer.

THE COURT was clearly of opinion, that ſuch acceptance of rent was no bar to a recovery in covenant, though otherwiſe in debt.

Judgment for the plaintiff.

Caſe 228.

Bilſon *againſt* Hill.

Declaration by indorſee of a note againſt indorſor is good, without ſtating the default of drawer.

WRIT OF ERROR in *aſſumpſit*, brought on a promiſſory note by the indorſee againſt the indorſor.

It was objected, that no default of payment by the drawer upon application to him was laid in the declaration.

CURIA. There is an expreſs promiſe of payment to the indorſee laid in the declaration; the other is matter of evidence only.

The judgment was affirmed (*a*).

(*a*) But ſee Ruſton *v.* Aſpinal, that in an action againſt the *indorſer* of a bill of exchange, if the plaintiff do not alledge a demand and refuſal by the *acceptor* on the day it was payable, it is error not cured by verdict. Dougl. 679.—See alſo Kyd on Bills, 193.

Caſe 229.

The King *againſt* Sir Robert Groſvenor and Others.

No uſage can controul the direction of a charter.

UPON A MOTION for an information in the nature of a *quo warranto* againſt the defendants, corporation officers of the city of *Cheſter*, among other things it appeared, that by a charter granted the ſixteenth year of *Charles the Second* the right of election of corporation officers was veſted in the mayor, aldermen, and commonalty at large; the defendants were elected by part of the corporation, excluſive of the commonalty, and an uſage ſet up to juſtify ſuch election.

THE COURT held clearly, that no uſage could controul the direction of a charter of ſo modern a date; and

LORD HARDWICKE, *Chief Juſtice*, mentioned the caſe of *the Corporation of Brecknock*, where the charter which was granted in the reign of *Philip and Mary* directed corporation officers to be choſen *de inhabitantibus*, and an uſage had prevailed from the fifteenth year of *Queen Elizabeth* to elect them without any regard to inhabitancy to that time; and upon a ſpecial verdict it was held in this court, that ſuch uſage in contradiction to the charter was void, and that judgment, upon a writ of error, was affirmed in the Houſe of Lords. It was agreed alſo in this caſe, that upon a judgment in an information in the nature of a *quo warranto* to the corporation itſelf cannot be diſſolved, but only the particular franchiſes abuſed ſeized into the hands of the crown. *Vide* 4. *Mod.* 52.

The King *againſt* Sir Robert Grosvenor and Others.

Read *againſt* Deatary.

Caſe 230.

A vicar cannot libel in the ſpiritual court for a cuſtomary *Eaſter* offering.—A prohibition ſhall not go after ſentence if the court has juriſdiction of the ſubject.

UPON ſhewing cauſe why a prohibition ſhould not go to the ſpiritual court, the caſe was this: The plaintiff below libelled for tithes for agiſtment of unprofitable cattle, and likewiſe for an annual offering of ſevenpence payable at *Eaſter*; and claimed them as vicar of the church of *Biſhop Wilton*, *tam ex dotatione fundatione*, *&c. quàm ex antiquâ conſuetudine.* The defendant denied the right to, &c. in the words of the libel, and ſentence for the plaintiff. The ſuggeſtion for a prohibition is, that the rector is entitled to ſuch payments, and that cuſtoms are triable at common law.

S. C. Barn. 392.
6. Com. Dig. "Prohibition" (G. 11.).

Dr. Lee *againſt the prohibition.* The payment to the rector is a new matter not pleaded below, and therefore not proper to be inſerted in the ſuggeſtion. 1, *Vent.* 335. The demand here is founded on the endowment, which is certainly a matter of ſpiritual cognizance. The words *ex antiquâ conſuetudine* are inſerted in all libels, and are matter of form only. As to the tithes, the words of the endowment are *decimas bladorum croſtorum creſcentium infra clauſuras, &c.* which extend to the preſent demand.

As to *the offering*, The words of the endowment are of every thing *quæ ad alteragium pertinent*; a term which, in the caſe of *Turner v. Andrews* (a), was conſtrued to comprehend all eccleſiaſtical demands, though it ſeems to carry with it a more reſtrained ſenſe. But however, as offerings cannot otherwiſe be due but by cuſtom, and a juriſdiction of proceeding in ſuch caſes is certainly given by the ſtatutes *De Circumſpectè Agatis*, *&c.* the 27. *Hen.* 8. 20. the 32. *Hen.* 8. 7. and the 2. *Edw.* 6. 13. the right of trying cuſtoms in ſuch caſes in conſequence is given to the ſpiritual courts. This motion alſo comes too late, being after ſentence. 1. *Cro.* 519. 2. *Keb.* 612. *Noy*, 70. *Wright v. Allen*, 9th *Nov.* 1723. An action brought in the admiralty upon a contract laid to be made *ſuper altum mare*, and ſentence given for the plaintiff; a prohibition was moved for, upon a ſuggeſtion that the contract was made in the harbour of *Plymouth*; but it was denied, becauſe that did not appear upon the libel, in which caſe only prohibition lies after ſentence.

Mr. Bootle *ſenior*. The conteſt here is between ſpiritual perſons, whether the rector or vicar is entitled; and in ſuch caſe the eccleſiaſtical courts have juriſdiction; though otherwiſe in the caſe of the laity (b). Where a defect of juriſdiction in the principal

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(a) 311. 2. Roll. Rep. 55. Goldſ. 149.
(b) 13. Co. 2. Roll. Abr. 310, 2. Bulſt. 157. 1. Lev. 59.

READ *againſt* BEATARY.

matter appears in the libel, prohibition lies after ſentence; otherwiſe where it is only *defectus triationis*, as in the principal caſe.

MR. FAZAKERLY *on the other ſide*. As to the tithes, it is plain that the demand is founded on the cuſtom, and the recovery muſt be accordingly; the words of the endowment extending only to the tithes of corn. The offering can be no otherwiſe due but by cuſtom, and cannot be founded on the endowment; for there muſt have been a uſage for the payment of it antecedent to the endowment itſelf; and therefore this right is only triable at law. Beſides, this is not a diſpute between eccleſiaſtics only; the defendant below is a layman; and it is not ſufficient that a queſtion ariſes in this caſe, whether the rector or vicar is entitled to the payment: a prohibition lies here after ſentence as well as before (*a*).

MR. DENNISON, to prove all cuſtomary dues triable at common law, cited *Taylor v. Scott* (*b*), where the libel was by the *Vicar of Wakefield* for a cuſtomary fee of tenpence for churching women (*c*). The common-law courts are the proper judges of endowments, and what is granted thereby (*d*).

LORD HARDWICKE, *Chief Juſtice*. As to the offering, there is no doubt but a prohibition muſt go; and there is no difference between a defect of original juriſdiction and a defect of power to try the ſuit below. Prohibition lies as well after ſentence as before (*e*). I know no caſe to the contrary, but that of ſuing out of the dioceſe; and in that caſe there is neither *defectus juriſdictionis* nor *triationis*; the perſon ſued there has only a privilege of ſtaying the proceedings againſt him upon a proper application to the temporal courts, which is waived, and no advantage can be taken thereof after ſentence. As to the ſtatutes which it is inſiſted give the ſpiritual courts a juriſdiction in trying cuſtoms upon which theſe dues are founded, that way of reaſoning will prove that a *modus* for tithes is triable there; tithes being always mentioned among other cuſtomary dues; but that there can be no pretence for.

As to the point of tithes for *agiſtment*, &c. if a ſpecial inſtrument of endowment had been ſet out under which theſe tithes were claimed to be due, and it appeared to us they were not included in that endowment, there could be no doubt then but that a prohibition muſt go, becauſe, as the demand would appear to us judicially not to be warranted by the endowment, it could only reſt upon the cuſtom, and that is not triable there. The caſe here is not ſo ſtrong, becauſe it is claimed *ex dotatione* generally, *et ex antiquâ conſuetudine*. Now it is poſſible theſe tithes might appear below to be due

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(*a*) 2. Salk. 548. Carth. 97.

(*b*) Eaſter Term, 2. *Geo.* 2.

(*c*) Lutw. 1052. Salk. 334. 3. Keb. 523.

(*d*) Moor, 457. 2. Roll. Abr. 335. Litt. Rep. 263.

(*e*) See 2. Inſt. 602. 619. 2. Roll. Abr. 318. Salk. 548. 2. Burr. 813. Cowp. 424. 1. Term Rep. 3. 552. 6. Com. Dig. "Prohibition" (D).

by ſome endowment or other; but however, as it is not diſcloſed by the proceedings below what the ſentence was founded on, and it might be one as well as the other, a prohibition ought to go, or otherwiſe the ſpiritual courts, by this general way of libelling, may try cuſtoms triable at common law only, without being ſubject to any reſtraint by prohibition after ſentence is once given.

Lee, *Juſtice.* The ſentence given in this caſe is no objection at all to the granting a prohibition. As to the tithes for *agiſtment, &c.* I doubt whether we can now grant a prohibition, becauſe it does not appear but that the ſentence might be warranted by ſome endowment or other. The inconvenience of ſuffering ſuch general allegations in libels ſeems not ſo great as is apprehended, becauſe the party may immediately apply for a prohibition when the ſpiritual courts begin to proceed againſt him upon the cuſtom.

As to *the offering*, that being a thing merely cuſtomary is not within their cognizance. The ſtatutes cited in maintenance of the juriſdiction below empower the ſpiritual courts to proceed and give ſentence as well for cuſtomary dues as tithes; but ſtill that is ſubject to trials of cuſtoms according to the courſe of the common law; and if the cuſtom is found in favour of the perſon who libels, then a conſultation goes, and they may give ſentence, and execute the authorities which are given by thoſe acts of parliament.

Lord Hardwicke, *Chief Juſtice.* What was ſaid by my Brother Lee about a prohibition not going after ſentence in this caſe, as to the demand for tithes, ſeems very material.

Let there, therefore, be a declaration in prohibition, that this matter may come properly before the Court by demurrer.

The King *againſt* The Mayor, &c. of Shrewſbury.

Caſe 231.

A *mandamus* to reſtore an alderman, and a return that he was removed for *abſence.*

A MANDAMUS having been granted to reſtore *Corbet Kynaſton, Eſq.* to the office of alderman, a return was made to it, in which, among other things, this part of the charter is ſet out, which requires every alderman to be reſident, either by himſelf or his family, within the borough or ſuburbs, unleſs in caſe of the plague or other contagious diſtemper. Then the return ſets out, that *Corbet Kynaſton* had not been reſident, either by himſelf or his family, for three years before the twentieth of *February* 1732, though there had been no plague or other contagious diſtemper in the borough or ſuburbs; that upon the twenty-third of *February* 1732, the mayor and majority of aldermen and common-council met upon corporation buſineſs, and then took into conſideration this non-reſidence of *Corbet Kynaſton*, and removed him from his office for ſuch non-reſidence.

S. C. 2. Barn. 317. 394. 440. 457.
S. C. B. R. H. 295. 377.
S. C. 4. Bro. P. C. 271.
Moor, 135.
Bull. N. P. 211.
2. Ld. Ray. 1275.
4. Burr. 2089.
Dougl. 149.
2. Ter. Rep. 772.
1. F. Vez. Rep. 6.

Mr. Strange objected to the return.

First,

The King *againſt* The Mayor, &c. of Shrewsbury.

First, As to the merits; that it is ſaid there was no plague or other contagious diſtemper in the borough or ſuburbs; whereas that clauſe ought to receive a larger conſtruction, that if there were a plague in other parts of the kingdom it ſhould excuſe his non-reſidence; for it would be an act of the greateſt cruelty to require his continuance there till the plague was got among them, when poſſibly he might be ſeized with it, or find a reception in any other place very difficult.

Secondly, It does not appear to have been a regular aſſembly at which he was removed; it is ſaid only "at a meeting of the mayor "and the major part of the aldermen and common-council *duly* "aſſembled." Now as this was not the common and ordinary buſineſs of the Corporation, which is directed by preſcription or charter to be done upon a particular day, a general ſummons of all the reſident members was neceſſary to make this a regular aſſembly. In the caſe of *The King v. Strangeways and Bull*, *Hilary Term*, in the firſt year of *George the Firſt*, it was held, that the majority of a corporation cannot proceed on any ſuch ſpecial buſineſs, unleſs there be a general ſummons. The word "*duly*," in this caſe, is not ſufficient; that is a matter of law; the fact ought to have been ſpecially ſtated, that the Court might judge of the regularity of the meeting. In convictions, it is not ſufficient to ſay, "*A. B.* not "being *duly* qualified, killed game, &c." but the facts by which he appears not to be duly qualified muſt be ſet out.

Thirdly, Though it does appear by the return that *Corbet Kynaſton* was not reſident, and therefore no perſonal notice requiſite to be given in order to defend himſelf, yet there ought to have been ſome public notice or other. In proceeding by way of attainder, the party has always time given him to come in; ſo in caſes of outlawry there are always proclamations. In *Dr. Bentley's Caſe* (*a*), want of ſummons was held fatal upon a return to a *mandamus* to reſtore him to his academical degrees. In *Serjeant Whitaker's Caſe* (*b*), want of ſummons was indeed held to be cured by appearance, but there is no pretence that the removal would otherwiſe have been regular.

Mr. Parker *on the other ſide*. The return purſues the words of the charter, that there was no plague, &c. in the borough, &c. and that is ſufficient. The word "*duly*" is a ſufficient allegation, is a matter traverſable, and muſt now be taken to be true. No ſummons is neceſſary, it appearing that *Corbet Kynaſton* was not reſident in the corporation; and ſo it was determined in *Serjeant Glide's Caſe*, *Show.* 365.; and in this reſpect the principal caſe is diſtinguiſhable from thoſe cited.

Lord Hardwicke, *Chief Juſtice.* There can be no pretence that a plague in any other part of the kingdom would excuſe his abſence. In *Serjeant Glide's Caſe* (*c*), it was not pretended that any

public

(*a*) 2. Bar. K. B. 19. 22.

(*b*) Salk. 434.

(*c*) 4. Mod. 33. S. C. 2. Show. 258. 364. S. C. Comb. 197. S. C. Holt, 169. 435. S. C. 12. Mod. 27. 251. S. C. 2. Ld. Ray. 223.

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public notice was requiſite; and though HOLT, *Chief Juſtice*, differed from the other three Judges in that caſe, yet it was upon a matter of form only, that it did not ſufficiently appear he was abſent ſo as not to be entitled to notice. As to the objection to the word "*duly*" in pleading, this would be ſufficient, and the ſpecial manner of ſummoning, &c. would come in evidence; and no caſe is cited to prove this wrong in a return. The only doubt with me is, that it is ſaid, "the mayor and major part of the aldermen, "&c.;" and it ſeems to me it ſhould have been, "the mayor, "aldermen, &c.;" for the act of a mayor and a majority of a corporation is the act of the whole; and it ſhould have been ſet out, not as it was in fact, but according to its legal operation.

PROBYN and LEE, *Juſtices*, concurred with THE CHIEF JUSTICE in all but the laſt point, who ſeemed to think the return good in that likewiſe.

Cock *againſt* Vivian.

Caſe 232.

An *indebitatus aſſumpſit* lies for tolls.

1. Bac. Abr. 165.
1. Com. Dig. 186.

THIS was an action of *aſſumpſit* brought by the leſſee of the market of *Helſton*, in *Cornwall*. The declaration ſtated, that the plaintiff was poſſeſſed of the market-houſe, and of the toll, and of pickage and ſtallage, and laid an *indebitatus aſſumpſit* to pay a certain toll in conſideration of the defendant having been permitted to ſet down his goods in the market, and alſo for pickage and ſtallage. There was alſo a count on a *quantum meruit*. On the trial, a general verdict was given for the plaintiff.

HUSSEY, *in arreſt of judgment*, inſiſted, that the declaration was erroneous, becauſe it appears that this was a public market, where every perſon had a right to depoſit their goods and wares for ſale, and therefore the alledged permiſſion to ſet his goods there is not a good conſideration for the promiſe, eſpecially as the common remedy on this ſubject is by *diſtreſs*. Beſides, an *indebitatus aſſumpſit* will not lie for *toll* any more than it will for a heriot.

SECONDLY, It is nowhere ſaid that the goods were ſold; and no toll is due unleſs the goods are ſold, and even then it is to be paid by the buyer.

THIRDLY, A *quantum meruit* will not lie for toll, for a toll muſt not only be reaſonable but certain; and a *quantum meruit* does not lie where a price is fixed and aſcertained.

SERJEANT CHAPPLE, *on the other ſide*, inſiſted, that by cuſtom a toll may be payable though the goods are not ſold, and that pickage and ſtallage may be included under the word "toll." It is clear, that in antient fairs toll may be demanded for the ſtanding of goods, though none of them are ſold (*a*). It has been held, that an *indebitatus aſſumpſit* will lie for ſcavage, though no

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(*a*) 2. Inſt. 220. 1. Lev. 174.

expreſs

Cock *againſt* Vivian.

expreſs promiſe was made to pay it (*a*). So alſo it lies for a cuſtomary fine (*b*).

The Court doubted as to the *quantum meruit* for a toll, and alſo whether *ſtallage* could be included in the word *toll*; but they ſeemed to incline that an *indebitatus aſſumpſit* would lie in this caſe (*c*).

(*a*) 1. Show. 35. Carth. 92.

(*b*) 3. Mod. 239. 2. Vent. 175. 3 Lev. 261. 3. Burr. 1717. Dougl. 728.

(*c*) See Mayor of Exeter *v.* Tremlett, 2. Wilſ. 95. Seward *v.* Baker, 1. Term Rep 618. in which laſt caſe it is expreſsly decided, that a general *indebitatus aſſumpſit* will lie for tolls.

EASTER TERM,

The Seventh of George the Second,

IN

The King's Bench.

Philip *Lord* Hardwicke, *Chief Juſtice.*
Sir Francis Page, *Knt.* } *Juſtices.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
William Lee, *Eſq.* } *Juſtices.*
John Willes, *Eſq. Attorney General.*
Dudley Ryder, *Eſq. Solicitor General.*

The King *againſt* Gibſon.

Caſe 231.

After conviction for a miſdemeanor the defendant cannot move for *a new trial*, unleſs he is perſonally preſent in court.

THE DEFENDANT having been convicted of forging a note, it was objected, on the part of the crown, upon a motion for a new trial, that no ſuch motion could be made, in the abſence of the defendant, any more than a motion in arreſt of judgment.

This ſeemed to be the opinion of the Court.

LORD HARDWICKE, *Chief Juſtice*, the next day mentioned the caſe of *The King v. Latt* (a), which was an information for perjury; and *The Queen v. Ridpath* (b), which was an information for a libel; in which caſes it was determined, that there is no difference between moving *in arreſt of judgment* and for *a new trial* as to that purpoſe. And LORD HARDWICKE directed this to be obſerved as a ſettled rule for the future.

S. C. 2. Stra. 968.
S.C. 1. Seſſ. Caſ. 428.
S. C. 2. Bar. K. B. 412. 418.
S. C. Cunn. 29.
Stra. 844.

This ſame motion being regularly made another day, the caſe appeared to be this: The defendant was convicted before LORD HARDWICKE in *London*, of forging a note. The indictment ſet

In what caſe a *variation* in an indictment of forgery between the recital of the inſtrument forged, and the ſetting it out according to *the tenor*.

(a) Michaelmas Term, 7. *Will* 3.
(b) Eaſter Term, 12. *Ann.* 10. Mod. 152. S. C. Fort. 358.

The King *againſt* Gibson.

out, that the defendant forged a note, dated the thirtieth of *June* 1713, under the hand of *Lady Macarty*. The words were "importing to be a writing whereby ſhe acknowledged to have received and borrowed of the defendant, and that he had *laid out* "*and expended for her, and for goods for her uſe*, to the amount of "two hundred and twenty-one pounds twelve ſhillings;" then the indictment goes on, "the tenor of which note or writing is as "follows;" then the note is ſet out *in hæc verba*, which acknowledges the receipt of money by the lady, other money laid out and paid for her, and *for goods before delivered*, amounting to the ſame ſum.

The exception taken to the indictment was, that here was a *variance* between the caſe ſet out as the purport of the note, and the tenor of it; for the purport ſuppoſed money lent, money paid for the lady's uſe, and other money paid for goods for her uſe, to be the condition of the note; whereas it appears by the note itſelf, that part of the condition of it was the ſale of goods to her by the defendant, which muſt be taken to be the meaning of the words "*goods delivered.*"

Lord Hardwicke, *Chief Juſtice*, informed the Court what were the reaſons which induced him to over-rule the objection, which was likewiſe taken at the trial.

First, That the words "before delivered" might as well be conſtrued to mean money advanced by the defendant to pay for goods delivered by a third perſon to the lady, as goods ſold and delivered by the defendant himſelf to her; and by that conſtruction, money paid for goods for her uſe, and for goods delivered to her, would mean the ſame thing.

Secondly, That ſuppoſe this was to be conſidered as a variance, yet as the note ſet out *in hæc verba* was clearly proved to be forged, that was ſufficient to warrant the verdict; there being no neceſſity that every thing charged in the indictment ſhould be proved, but a proof of the moſt material fact, as there was in this caſe, was all that was neceſſary.

Thirdly, That what is ſet out as the tenor of the note is the fact charged in the indictment; and what there is mentioned as the purport, &c. was matter of inference and collection of the jury, and therefore any failure therein would not vitiate.

The Court unanimouſly concurred with the *Chief Juſtice*, and the motion was denied.

Caſe 232. Day *againſt* Serle.

If there is a contract by deed, with unuſual covenants between maſter and mariners reſpecting wages, they cannot be ſued for in the admiralty.—S. C. 2. Stra. 968. S. C. Cun. 32. S. C. 2. Barn. 419. 2. Salk. 424. 2. Wilſ. 264. 1. Vent. 343. 2. Ld. Ray. 1206. 4. Burr. 1950. 3. Term Rep. 267.

Mr. Draper moved for a prohibition to the court of admiralty to ſtay a ſuit there for *mariners wages*, upon a ſuggeſtion, that the contract between the mariners and the maſter was by writing, under hand and ſeal, and affidavit made of the execution thereof by one of the ſubſcribing witneſſes.

Mr. Marsh ſhewed cauſe againſt the rule, and cited the caſe of *Coke v. Cretchet* (a) in contradiction to the caſe of *Opie v. Child* (b). He inſiſted that prohibitions were intirely in the diſcretion of the Court (c); that the ſtatute of the 2. *Geo.* 2. c. 36. ſ. 2. requiring all contracts between maſters and mariners to be in writing, it would be very hard if any impoſition by the maſter upon the mariners, in prevailing upon them to ſet their ſeal, ſhould deprive them of that remedy which they would otherwiſe have, of recovering their wages in the admiralty court.

Mr. Draper. The caſe of *Coke v. Cretchet* ſays only "charter "party," which poſſibly might be between the maſter and owners, and therefore it is not applicable to the preſent caſe. This contract appears to be under the hands and ſeals of the maſter and mariners, and they having accepted of him as their paymaſter, they cannot have recourſe to the owners, as the ſuit below was, but the maſter only is chargeable. In *Garnham v. Bennet* (d), upon a motion for a new trial the caſe was, the maſter of the ſhip beſpoke goods for the ſhip and gave his note for the payment of the money; and it was held, that the merchants, by accepting the maſter as their payer, by the note given, had diſabled themſelves from recovering againſt the owners (e). The ſtatute 2. *Geo.* 2. c. 36. is not material, that requiring the contract to be in writing only, and not under hand and ſeal.

Lord Hardwicke, *Chief Juſtice.* It ſeems clear, that the contract entered into between the maſter and the mariners will not deprive them of any remedy which they would otherwiſe have in the admiralty court. The ſtatute 2. *Geo.* 2. c. 36. requires ſuch contract to be entered into between, &c. and any right which they had of recovering before, being ſaved by that act, I always thought, that wherever there was any contract by deed, or there were any covenants other than the uſual ones, the court of admiralty had no juriſdiction. And in the preſent caſe here were covenants for payment of the wages, which are not uſual: As a covenant on the part of the mariners, that if they were not capable of performing the voyage, and doing the buſineſs of the ſhip, they would deduct ſo much of their wages as two of the officers of the ſhip ſhould think reaſonable; that if they carried goods of their own, without the privity and conſent of the maſter, or if they left their own ſhip and went aboard any of the king's ſhips in his ſervice, a privilege expreſsly allowed by the 2. *Geo.* 2. c. 36. that they ſhould forfeit their wages. And the contract is alſo by deed.

(a) 3. Lev. 60.

(b) 1. Salk. 31.

(c) 1. Salk. 33.

(d) Michaelmas Term, 2. *Geo.* 2. 1. Bar. K. B. 96. S. C. 2. Stra. 816.

(e) See Rich v. Coe, Cowp. 636. Farmer v. Davies, 1. Term Rep. 108.

Day *againſt* Searle.

The other Judges being of the ſame opinion, the rule for a prohibition was made abſolute (*a*).

(*a*) See Howe *v.* Napier, 4. Burr. 1209. Menetone *v.* Gibbons, 3. Term 1944. Bew *v.* Parry, 2. Ld. Ray. Rep. 267.

Caſe 233.

Wainwright *againſt* Bagſhaw.

After the allowance of churchwardens accounts by the miniſter and pariſhioners, the ſpiritual court has no juriſdiction.

S. C. 2. Barn. 421.
S. C. 2. Stra. 974.
S. C. Cunn. 33.
S. C. And. 11. *notis.*

Mr. Abney ſhewed cauſe why a prohibition ſhould not go to the ſpiritual court of *Litchfield*, to ſtay a ſuit there againſt the now defendants, churchwardens, to which they pleaded an allowance of their accounts by the miniſter and a great majority of the pariſhioners and inhabitants; and that plea refuſed below.

He inſiſted the plea did not purſue the canon (*a*), which requires ſuch account to be given before the pariſhioners and inhabitants, whereas a mere inhabitancy in a pariſh will not give any right to a perſon to concern himſelf in allowance of the accounts. He inſiſted that there were many extravagant *items* in the accounts, ſuch as ought not to be allowed in juſtice to the pariſh, which they were ready to verify by affidavit; and that this was the only remedy they had of ſetting this matter right.

Mr. Strange, *on the other ſide*, inſiſted, that after an allowance of the accounts by the miniſter and the pariſhioners the ſpiritual court had no juriſdiction, however extravagant the charge might be upon the pariſh; and cited *Dr. Prideaux of the Office of Churchwardens*, 103.

Mr. Dennison cited the caſe of *Nutkins*, *Churchwarden of Hammerſmith*, *v. Robinſon and Carey*, in the exchequer, *Michaelmas Term*, 1. *Geo.* 2.; and the caſe of *Hawton*, *Churchwarden of St. Alban*, *Wood-ſtreet*, *v. Kendrick and Others*, laſt *Eaſter Term* in the ſame court, where it had been ſo determined; and *Lutw.* 1028.

Lord Hardwicke, *Chief Juſtice.* The juriſdiction of the ordinary extends no farther than to compel the churchwardens to come to an account before the miniſter and pariſhioners, for he cannot himſelf take the account, or enter into an enquiry into the reaſonableneſs or extravagance of the charge, if the parties intereſted acquieſce in it; and it would be a very abſurd thing to ſuffer that court to proceed, when the ſentence againſt the churchwardens can only be *quod computent*, and that has been done already; and ſhould it go again before the pariſhioners the accounts might be allowed in the ſame manner, and the ſuit prove of no conſequence at all. The words "pariſhioners and inhabitants" muſt be conſtrued conjunctively to mean only ſuch inhabitants as were pariſhioners.

The rule was made abſolute (*b*).

(*a*) The 89th Canon of thoſe made in the year 1603.

(*b*) See Snowden *v.* Herring, Bunb. 289. Nutkins *v.* Robinſon, Bunb. 247. and Adams *v.* Ruſh, 2. Stra. 1133. Leman *v.* Goulty, 3. Term Rep. 3.

Harris *Qui Tam againſt* Reely.

Caſe 234.

The ſtatute 21. *Jac.* 1. c. 4. which requires an affidavit of the offence having been committed within a year, before a penal action can be brought, does not extend to actions for penalties inflicted by ſubſequent ſtatutes.

S. C. 2. Barn. 413. 420.
S. C. Cun. 30.
1. Stra. 415.
2. Stra. 1081.
4. Hawk. P. C. ch. 26. ſ. 34, 35.
3. Term Rep. 364.
4. Term Rep. 109.

WRIGHT, *Serjeant*, moved to ſtay proceedings in an action, grounded on the 15. *Car.* 2. againſt a butcher for ſelling living cattle; no affidavit having been made previous to the action brought, that the offence was committed within a year before the time of bringing the action, and in the county where the action was brought, as is required by the 21. *Jac.* 1. c. 4. (*a*).

A rule to ſhew cauſe was granted.

On the day of ſhewing cauſe MR. KETTLEBY ſaid, this being an offence created ſubſequent to the 21. *Jac.* 1. c. 4. the method of proceeding for recovering the penalty is not controuled by that act, for that it has been ſolemnly ſettled, that the ſtatute of 21. *Jac.* 1. c. 4. is repealed *pro tanto*, that is, as to offences created ſince that time (*b*).

WRIGHT, *Serjeant, on the other ſide.* The ſtatute of 21. *Jac.* 1. c. 4 diſables informers from ſuing for a penalty "in any of his majeſty's courts at *Weſtminſter*, unleſs the offence is committed in "that county, but before juſtices of aſſize, &c.;" then comes another clauſe, requiring the affidavit to be made. Now the ſtatute of *Charles the Second* upon which this action is grounded, impowering the informer to ſue for the penalty in any of his majeſty's courts of record, repeals that clauſe of the ſtatute 21. *Jac.* 1. by which they were reſtrained from ſuing in the courts of *Weſtminſter*. But that other clauſe relating to the affidavit ſtands unrepealed, and muſt ſtill be complied with in all popular actions, though for offences ſubſequent to that ſtatute 21. *Jac.* 1. c. 4.; and that muſt be taken to be the meaning of what is ſaid in *Salkeld* "repealed *pro tanto*;" that is, repealed as to the locality of ſuch actions, but not as to the method of proceeding.

LORD HARDWICKE, *Chief Juſtice.* That clauſe in the 21. *Jac.* 1. c. 4. with regard to the affidavit, &c. cannot now be conſtrued to extend to actions brought for penalties inflicted by ſucceeding ſtatutes, the words being "on the *ſaid* penal ſtatutes," which confines the clauſe to the offences created by an act of parliament then in being, and not by ſuch as have been made ſince. The meaning of the words "repealed *pro tanto*," mentioned in *Salkeld*, muſt be, that with reſpect to offences created by ſubſequent acts the 21. *Jac.* 1. cannot take place, but is *pro tanto* repealed; and that conſtruction is agreeable to the ſecond reſolution in *Hicks's Caſe*.

THE OTHER JUDGES concurring unanimouſly, the rule was diſcharged.

(*a*) See 2. Hawk. P. C. ch. 26. ſect. 26 to ſect. 50. White *v.* Boot, 2. Term Rep. 274. Leigh *v.* Kent, 3. Term Rep. 362. Ball *v.* Atwood, 1. H. Bl. Rep. 546.

(*b*) Rex *v.* Gaul, 1. Salk. 372. Rex *v.* Hicks, 1. Salk. 373.

Caſe 235.

Harris *againſt* Burley.

Execution may be taken out on a judgment in the palace court, removed and affirmed, and error *coram vobis* brought.

S. C. 2. Bar. 430. 432.

MR. BENNE moved for leave to take out execution on a judgment in THE PALACE COURT, removed hither by writ of error, and the judgment affirmed thereon; and ſince that a writ of error *coram vobis* brought; and cited *Hern v. Buſhel, Eaſter Term,* in the ſixth year of *George the Second,* where the ſame was done (*a*).

MR. STRANGE *on the other ſide.* The plaintiff in error cannot aſſign matter of law and of fact too for error; and he ought not to be precluded from taking advantage of either, ſome way or other. The caſe of *Thompſon v. Hunt, Eaſter Term,* in the fourth year of *George the Second,* is the ſame with the preſent; there judgment in *aſſumpſit* in THE PALACE COURT was affirmed on error brought in this court; and on a writ of error *coram vobis* afterwards brought, a motion was made to ſtay the proceedings, on an affidavit that *coverture,* the fact now aſſigned for error, was given in evidence at the trial, and yet a verdict for the plaintiff; and a rule was obtained to ſhew cauſe, but that rule was afterwards diſcharged. The caſe of *Hern v. Buſhel* is clearly diſtinguiſhable from this caſe; for there the coverture was pleaded below, and the Court would not ſuffer the ſame fact to be aſſigned for error; for if there ſhould be a verdict for the plaintiff in error, that contradiction would appear upon the record, whereas in the preſent caſe the general iſſue of *non aſſumpſit* was pleaded.

MR PARKER *on the other ſide.* There can be no queſtion but that upon the firſt writ of error, either error in fact or in law might have been aſſigned; and therefore the plaintiff in error not prejudiced. It has been often determined, that after a judgment affirmed in the exchequer chamber upon error there brought, and the record remitted to this court, no writ of error *coram vobis* in the king's bench lies afterward (*b*); and he cited the caſe of *Lambden v. Prettyjohn, Hilary Term,* in the twelfth year of *George the Firſt,* when upon ſuch a writ of error brought after an affirmance in the exchequer chamber, and *the infancy* of one of the defendants in the action aſſigned for error, it was held no ſuch writ of error would lie.

LORD HARDWICKE, *Chief Juſtice.* The plaintiff in error may certainly aſſign matter in fact or law for error, but not both; but I do not ſee why that may not as properly be done, as to ſuffer two different writs of error to lie. A writ of error *coram vobis* lies when the firſt is abated by death, and ſo the party deprived of aſſigning any error in fact, to remedy which a writ of error *coram vobis* lies; and not where there has been a judgment of affirmance.

At another day LORD HARDWICKE, *Chief Juſtice,* delivered the opinion of THE COURT in this manner: As to the caſe of *Thompſon v. Hunt,* we can no otherwiſe judge of that than as it appears upon the rules which were made in the cauſe; the rule

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(*a*) Ante, 168.

(*b*) 1. Vent. 207. 2. Lev. 38. 3. Keb. 28, 29.

was to ſhew cauſe why the aſſignment of errors ſhould not be ſet aſide, but no rule to ſtay the proceedings on the writ of error. There is but one modern caſe in favour of this opinion, and that is in *Salk.* 337. but that caſe, as it appears by the Roll and by *Lilly's Entries*, is miſreported. The authorities in the Books go upon this diſtinction, that when the record below is not well removed, as by a variance between the writ of error and the judgment below, &c. there the party muſt bring a new writ of error; but where the record is well removed, and the writ of error is abated by the death of the parties, or the plaintiff in error is nonſuited, there a writ of error *coram vobis* lies, but never after a judgment of affirmance. There is but one old authority which I can find to the contrary, and that is in 1. *Roll. Abr.* 754, 755. *pl.* 15. and that caſe is manifeſtly ill reported. The Book ſays, that "after "a judgment of reverſal in the king's bench in *Ireland*, of a judg-"ment obtained in the common pleas, and that judgment of re-"verſal in *Ireland* reverſed in the king's bench in *England*, and "that the judgment given in the common pleas in *Ireland* ſhall "ſtand, that a writ of error *coram vobis* may afterwards be brought "in the king's bench in *Ireland*, of the judgment obtained in the "common pleas there." *Mr. D'Anvers* ſuppoſes the writ of error *coram vobis* ſhould be ſaid to be brought in the king's bench in *England*, and he is certainly right; but ſtill that will not do. This ſame caſe is alſo reported in *Yelv.* 117. and by that it appears the firſt writ of error in the king's bench in *Ireland* was diſcontinued, and that was the reaſon a writ of error *coram vobis* lay in the king's bench in *England*; becauſe in the king's bench in *Ireland*, there was no judgment of affirmance or reverſal of the firſt judgment there.

Mr. Strange ſaid, the preſent caſe was diſtinguiſhable from any cited, becauſe the writ of error was brought by the *feme* only, and the writ of error *coram vobis* by the *baron* and *feme*; and this was the firſt opportunity the *baron* had of aſſigning this matter for error.

But it was ſaid by Lord Hardwicke that that made no difference.

It was agreed, that writs of error *coram vobis* are not within the ſtatute which requires bail on writs of error.

The rule was made abſolute.

Dobbs *againſt* Paſſer.

Caſe 236.

The Court will ſet aſide a judgment though regular, in *ejectment*, in order to try the merits.

DECLARATION in ejectment was delivered the third of *January*, and judgment ſigned, for want of the defendant's appearance on the ſixteenth of *February*: on the twenty-fifth of *February* the landlord had notice of the judgment; on the twenty-eighth Mr. Justice Lee was applied to, that upon payment of

S. C. 2. Stra. 975. S. C. 2. Bar. 431.

Dobbs *againſt* Passex.

the coſts the judgment might be ſet aſide, and the defendant let in to try the merits at the next aſſizes, which were the ſixth of *March* in *Eſſex*; MR. JUSTICE LEE made an order to that purpoſe, which was not complied with.

Upon ſhewing cauſe, by the plaintiff, why the judgment ſhould not be ſet aſide, it was admitted to be the practice of the Court in all caſes, except *ejectment*, that where a judgment had been obtained, though ſtrictly regular, yet if there could be a trial had without any prejudice to the plaintiff, as where no loſs of time, &c. the Court would ſet aſide the judgment and order the merits to be tried; but that in ejectment that was never done, the right not being determined in ejectment the poſſeſſion only changed, and the party was at liberty to bring a new ejectment whenever he pleaſed.

MR. STRANGE *contra*. Though the court of common pleas always exerciſed the power of ſetting aſide judgments under the circumſtances of this caſe, yet this Court would not formerly do it without conſent on both ſides; but in the caſe of *The King v. Glaſs (a)* this Court came into the ſame practice with the other Court, and that has been purſued ever ſince here. Formerly, likewiſe, it was an anſwer to a motion for a new trial, to ſay it was in ejectment, which was not concluſive; but of late no regard is had to that anſwer. The changing of poſſeſſion is a thing of very great conſequence, it being often difficult for a perſon, though really entitled to an eſtate, to make out his right, and ſo may fail; whereas he would be under no ſuch hardſhip if he was defendant, as the plaintiff in ejectment muſt recover by the ſtrength of his own title.

THE COURT was clearly of that opinion, upon conference with the Judges of the court of common pleas, and ſaid there was no diſtinction made in the court between ejectments and other actions.

The rule was made abſolute (*b*).

(*a*) Hilary Term, 2. *Geo.* 2.

(*b*) See Doe, on the demiſe of Troughton, *v.* Roe, 4. Burr. 1996.

Caſe 237. Gamage *againſt* Watkins.

In debt on a judgment where the debt is under 10*l.* the defendant cannot be held to bail, though by the addition of coſts it is above that ſum.

WRIT OF ERROR brought here on a judgment in an action for three guineas in the court of common pleas; the judgment was for fourteen pounds debt and coſts, and upon action brought againſt the plaintiff in error on that judgment, he was held to ſpecial bail.

MR. DENNISON moved, that the plaintiff in error might be admitted to imparl to the action, pending the writ of error, and might be diſcharged on filing common bail.

S. C. 2. Stra 975. S C. 2. Bar. 434. 3. Burr. 1389. 2. Stra. 1077. 4. Burr. 2117. 1. Wilſ. 320. 5. Burr. 2660. Cowp. 128.

Mr. Strange, *contra*, cited *Chambers* v. *Robinſon*, *Michaelmas Term* 1. *Geo.* 2. where it was determined that ſpecial bail might be required in the firſt action of debt brought on the judgment, though not in any ſubſequent action brought thereon.

Mr. Dennison. In that caſe no writ of error was brought, and until that is determined it does not appear that any debt is due.

Lord Hardwicke, *Chief Juſtice*. It is pretty extraordinary that the pendency of a writ of error ſhould not be a good bar to an action brought on the judgment, as it is a *ſuperſedeas* to any execution; but, however, in tenderneſs to the plaintiff in error, we never compel him to plead, but give him leave to imparl; and there can be no pretence to hold the party to bail while the writ of error is depending.

Probyn, *Juſtice*. It is a conſtant rule, that no bail is required in debt on a judgment in debt, where it cannot be required in the original action, which appears here to have been but for three guineas, though the demand is now ſwelled up to fourteen pounds.

The Chief Justice agreed, and ſaid, at that rate bail would be given for coſts, which ought not to be (*a*).

(a) But it is now decided in the caſe of Lewis v. Pottle, 4. Term Rep. 570. that a defendant may be held to ſpecial bail in an action on a judgment for ten pounds, for damages and coſts, though the original debt was under ten pounds.

Carey *againſt* Hinton.

Caſe 238.

An *informal iſſue* is aided by verdict.

S. C. 2. Keil. 153.
S. C. 2. Stra. 973.
S. C. 2. Bar. 363. 436. 449.
5. Com. Dig. "Pleader" (R. 18.) (S. 4.).

TRESPASS *quare clauſum fregit*, &c. The defendant pleaded, that the *locus in quo*, &c. was his own proper land. The plaintiff replied, that it is his eſtate of inheritance and his proper lands, and traverſed that they were the proper lands of the defendant. And iſſue joined thereon, and verdict for the plaintiff.

Mr. Kettleby moved for a repleader, this being an *immaterial iſſue*, the words "proper land" not implying any poſſeſſion in the plaintiff, without which this action, being a poſſeſſory one, cannot be maintained, and they will as properly ſignify a reverſion or remainder in fee.

Mr. Dennison. This is an *informal iſſue* only, and not an *immaterial one*, and ſo cured by verdict. 5. *Co. Nichols*'s *Caſe*. 2. *Bulſt.* 41. *Moor*, 464. 1. *Syd.* 289.

N. B. The meaning of the plea *liberum tenementum* is, that the defendant is ſeiſed in fee and has a right to enter, and the poſſeſſion of the plaintiff is admitted by ſuch plea.

Mr. Strange, *at another day*. This defect, if any, is cured by the verdict (*a*). In treſpaſs, the defendant pleads, that *A.* was *ſeiſed* and demiſed to him, and then preſcribes for a way; and upon a

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(a) 5. Co. 43. Salk. 365. Yelv. 227. and the caſe of Yateman v. Muſton, 10. Mod. 228. 300. Gilb. 305.

CAREY *againſt* HINTON. motion in arreſt of judgment, after verdict, it was objected, that the word "*ſeiſitus*" might as well mean an eſtate for life as in fee; and if it be conſtrued for life only it will be bad, as a preſcription cannot be annexed to ſuch an eſtate; but this defect was held to be aided by the verdict. He cited alſo 1. *Cro.* 87. 2. *Cro.* 678. 2. *Saund.* 317. *Hob.* 126.

LORD HARDWICKE, *Chief Juſtice.* The queſtion is, Whether this be an immaterial iſſue, or only an informal one? If immaterial, though the fault lie in the defendant's plea, yet the Court cannot give judgment, but there muſt be a repleader. But here ſeems to be only a defect in form; the defendant here pleads that they are his proper lands, by which he claims ſome kind of property in them or other. The plaintiff replies and ſays, they are his eſtate of inheritance and his proper lands, and not the proper lands of the defendant. And it being found by verdict that they are not the proper lands of the defendant, his plea is ſatisfied; and it appears that now he has not any property whatſoever in him, and therefore the ſubſtance and merits of the caſe ſeem to have been in iſſue, and determined by the verdict.

PAGE and PROBYN, *Juſtices*, were of the ſame opinion.

But LEE, *Juſtice*, ſeemed to think it a defect not cured by the verdict; for though it does now appear that the defendant had no property in the land, yet it does not appear that the plaintiff had ſuch an immediate intereſt in the eſtate under which he could maintain an action of treſpaſs.

At another day LORD HARDWICKE, *Chief Juſtice*, gave the reſolution of THE COURT. The verdict finds, that the cloſe, &c. is, and at the time, &c. was the eſtate of inheritance and proper lands of the plaintiff, and not the proper lands of the defendant. We are all of opinion that this defect is aided by the verdict, though it would be fatal on demurrer. Perhaps it might not have been ſufficient to find that theſe were the proper lands of the plaintiff; but the verdict goes further, and finds that they were the eſtate of inheritance of the plaintiff, which in conſtruction is the ſame thing as if the party had alledged he was ſeiſed in fee or in tail. The words *liberum tenementum* do not by their natural force expreſs a freehold in poſſeſſion, but they have obtained that meaning by conſtruction, becauſe a precedent intereſt ſhall not be intended, and the ſame rule holds in conſtruing the words "eſtate of inheritance." The caſe of *Yateman v. Buſton* is a very ſtrong one to ſupport this verdict, and in that caſe 1. *Vent.* 123. was cited, by which it appears, that the Court will intend in favour of verdicts. But to make this bad there muſt be an intendment of a prior intereſt in ſome other perſon, in order to deſtroy this verdict.

The rule was diſcharged.

Deveniſh

Deveniſh *againſt* Mertins.

Caſe 239.

In what caſe double coſts ſhall be awarded.

S. C. 2. Barn. 373. 432. 449.
S. C. 2. Stra. 974.
Bull. N. P. 332.

TRESPASS for taking away a gun from the plaintiff. The plaintiff diſcontinued by leave of the Court.

Baines, *Serjeant*, moved for the direction of the Court to THE MASTER to tax double coſts, according to 7. *Jac.* 1. c. 5. upon producing an affidavit, that the action was brought againſt the defendant for what he did in the execution of his office as juſtice of peace under the 5. *Ann.*

Lee, *Juſtice*, cited the caſe of *Catheral v. Cowper (a)*, where, in a caſe of the like nature, a ſuggeſtion of the like nature was entered upon the roll, as a foundation to *enable* the party to double coſts,

Mr. Hayward, *for the plaintiff*, inſiſting that the fact in the affidavit was otherwiſe, a rule was granted to ſhew cauſe why ſuch a ſuggeſtion ſhould not be entered, that the party might have an opportunity of controverting the fact.

Lord Hardwicke, *Chief Juſtice*, gave the reſolution of THE COURT. There are two queſtions: THE FIRST, Whether the defendant be entitled to double coſts under the ſtatute *Jac.* 1.?

THE SECOND, What is the proper method of awarding them?

As to THE FIRST, Though it has been inſiſted upon that there ought to be a previous conviction of the offender, before the juſtice can juſtify the taking away the gun, that ſeems not neceſſary under this act of the 5. *Ann.* the ſame authority, by the ſame clauſe, being given to lords of manors, who cannot as ſuch convict. It appears plainly by affidavits, that this action was brought againſt the defendant for what he did in the execution of his office as a juſtice of peace.

As to THE SECOND QUESTION, No ſuggeſtion upon the roll is neceſſary or proper in this caſe. All the caſes cited, where ſuch a ſuggeſtion has been entered, are either after verdict and no certificate by the Judge of *niſi prius*, or after nonſuit; in both theſe caſes a ſuggeſtion is very proper, becauſe there a judgment is given for the defendant, which is a proper foundation for entering a ſuggeſtion afterwards (*b*). But in the caſe of *a diſcontinuance* no judgment at all is given, but both parties are out of court, and no coſts at all can be given in the common caſe of diſcontinuance. Indeed when *a diſcontinuance* is with leave of the Court, we always do it upon payment of coſts, but the party has his remedy for them on the rule only; the ſame manner of remedy muſt be for double coſts.

(*a*) 2. Kely. 59. 2. Bar. K. B. 103. 317.

(*b*) But ſee Anonymous, 2. Bar. K. B. 171. Anonymous, 2. Vent. 45. and Grindley *v.* Holloway, Dougl. 294.

Direction

Devenish againſt Mertins.

Direction was given to the maſter to tax double coſts, and upon payment of them the plaintiff to be at liberty to diſcontinue.

Caſe 240. Lumley againſt Palmer.

A parol acceptance is ſufficient in an action againſt the acceptor of a bill of exchange.

S. C. B. R. H. 74.
S. C. 2. Stra. 1000.
S. C. Bac. Abr. 611.

ACTION againſt an acceptor of a bill of exchange, tried before Lord Hardwicke, in *London*, this Term. Upon the evidence it appeared to be a *verbal acceptance* only, which Lord Hardwicke thought ſufficient. The ſtatute 3. & 4. *Ann.* c. 9. ſ. 5. he ſaid, made an acceptance *in writing* neceſſary only for the purpoſe of charging the drawer, on proteſt, with damages and intereſt, and not to bar the party from charging the acceptor; and by no other conſtruction could the ninth ſection of that act be reconciled. There was a verdict for the plaintiff, with liberty given to the defendant to move the Court.

Darnell, *Serjeant*, moved for a new trial, and cited the caſe of *Rea v. Maggot (a)*, at the Sittings after laſt Term in the common pleas, where his client was nonſuited for this objection. It was agreed, that Lord Raymond always ruled it in the ſame manner Lord Hardwicke did this.

Lord Hardwicke, *Chief Juſtice*, ſaid, It was much to be wiſhed the courts of *Weſtminſter-Hall* were more uniform in their reſolutions, eſpecially in caſes which occur ſo often, and which are of ſuch univerſal concern; and adjourned the determination of it until he had conferred with *Chief Juſtice* Eyre.

N. B. The caſe of *Erſkine v. Murray (b)* was cited, which was an action againſt an acceptor of a bill of exchange; demurrer to the declaration, becauſe the acceptance was not laid to be in writing; and the objection over-ruled.

Lord Hardwicke, *Chief Juſtice*, ſaid, he thought that caſe no authority, one way or other, in this caſe; for though an acceptance in writing ſhould be neceſſary, yet it need not appear on the declaration, but it would be ſufficient to give it in evidence; which conſtruction has prevailed on the ſtatute of Frauds, in regard to things required to be in writing.

Adjourned (c).

(a)

(b) Michaelmas Term 2. *Geo.* 2. 2. Stra. 817. S. C. 2. Ld. Ray. 1542.

(c) In order finally to ſettle this point, it was ordered to be argued, and the Court was finally of opinion that the direction in the preſent caſe was right, and therefore ordered the *poſtea* to the plaintiff. 2. Stra. 1000. See alſo Julian v. Shobroke, 2. Wilſ. 9. Pillans v. Van Microp, 3. Burr. 1672. Sproat v. Mathews, 1. Term Rep. 182.

The King *againſt* The Biſhop of Litchfield. Caſe 241.

A MANDAMUS was granted to the *Biſhop of Litchfield* to licenſe one *Ruſhworth*, who had been elected by the inhabitants of the city of *Coventry* uſher of a free grammar-ſchool there, founded in the reign of *Henry the Eighth* by *Mr. John Hales.*

The biſhop may take a reaſonable time to enquire the character of a perſon elected uſher of a free grammar-ſchool before he licenſe him.

S. C. 2. Stra. 1023.
S. C. 2. Barn. 365. 428.
S. C. And. 367.
S C. 2. Kely. 287.
Comy. 448.

To this *mandamus* the biſhop returned, that by the antient canon law the power of licenſing ſchool-maſters belonged to the ordinary. Then the canons of 1603 are ſet out, the ſeventy-ſeventh of which requires ſuch licence to be had; and that *Ruſhworth* is a perſon in holy orders; that a great many perſons who are electors were diſſatisfied with his election; that applications had been made to the biſhop, by way of petition and affidavits, to ſuſpend the granting him a licence until the next viſitation, when they would make it appear that he was a perſon of a very profligate and ſcandalous life, and very unfit for the education of children; that at the viſitation a *caveat* was regularly entered againſt granting ſuch licence; that *Ruſhworth* appeared thereon, and the articles of complaint were exhibited againſt him, which in the return the biſhop ſet out *in hæc verba.* Then the biſhop ſays, that he has not refuſed to grant a licence, but has only ſuſpended the granting of it until he has received ſatisfaction whether he is a perſon proper to be licenſed or not.

Birch, *Serjeant, againſt the return.* The allegation, that by the canon law the ordinary has a power to compel ſchool-maſters to take out a licence, as a qualification to teach ſchool, muſt be proved on the other ſide. It does not appear what the nature of the affidavits is, nor that they were ſworn before a perſon properly authorized to adminiſter an oath, as is neceſſary (*a*). The ſtricteſt certainty is required in returns (*b*). It does not appear that *Ruſhworth* was ſummoned to anſwer the charge before the licence was refuſed, which is neceſſary in all caſes. In the caſe of *The King v. Dr. Bentley (c)*, it was held that there could be no ſuſpenſion or degradation without a previous ſummons. The articles exhibited againſt him are not material, there being no ſentence therein.

Mr. Parker *on the other ſide.* A *mandamus* lies not for ſuch an office as this (*d*). In the caſe of *Vincent v. The Biſhop of London (e)* that of *Tutton v. Reynolds (f)* was cited, where it was determined, that upon the ordinary's refuſal to licenſe a lecturer *a mandamus* lies not, but the remedy is by appeal. He then cited ſeveral authorities from the canon law in proof of the ordinary's power of licenſing; and the 23. *Eliz.* c. 1. ſ. 6. the 1. *Jac.* 1. c. 4. ſ. 9. and the 13 & 14. *Car.* 2. c. 4. as ſo many parliamentary recogni-

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(*a*) Latch, 39. 133.
(*b*) Salk 432.
(*c*) 2. Stra. 912.
(*d*) Stiles, 457. 1. Sid. 40. 1. Keb. 5.
(*e*) Trinity Term 13. *Geo.* 1. in the court of exchequer.
(*f*).

tions

THE KING *againſt* THE BISHOP OF LITCHFIELD.

tions of that right. The ordinary may puniſh for teaching without licence (*a*). The uncertainty of the return, with reſpect to the affidavits, is not material, for it appears that this matter is depending in a proper court, and until it is determined no *mandamus* lies (*b*). A *mandamus* lies not to compel the granting probate of a will, while it is in controverſy below (*c*). A *mandamus* was refuſed to admit a lecturer, it appearing the right was in controverſy, and in a proper method of determination (*d*). The ordinary in this caſe acts judicially, and not miniſterially, and in ſuch caſe a *mandamus* lies not. This is like the ordinary's power of examining a preſentee to a living, and he is the ſole judge of his qualification. 15. *Hen.* 7. c. 8. 5. *Co.* 57 (*e*).

LORD HARDWICKE, *Chief Juſtice.* There are ſeveral things conſiderable in this caſe: FIRST, With regard to the ordinary's power of compelling ſchool-maſters to be licenſed: SECONDLY, Whether he acts judicially or miniſterially in this caſe: THIRDLY, Whether ſufficient matter be diſcloſed to the Court to induce them to ſuſpend the granting a peremptory *mandamus*.

As to THE FIRST, It is pretty extraordinary how the keeping a grammar-ſchool ſhould be matter of eccleſiaſtical conuſance. Many authorities have been cited from the canon law in maintenance of that power, but that is not ſufficient, unleſs it appear that thoſe canons have been received. The canons of 1603 are not obligatory on the laity, as they have never been confirmed by act of parliament; but, however, that is not material here, this being the caſe of a clergyman.

As to THE SECOND, If the biſhop here acts judicially, a *mandamus* lies not to compel him to grant a licence, but only to determine the one way or the other; as we often grant them to give ſentence, generally, without directing them what ſentence to give; ſo to give judgment in inferior courts: but if he acts miniſterially, and it appears to us that the perſon applying for the *mandamus* is qualified for the office he prays to be admitted to, then a *mandamus* goes requiring his admiſſion. I ſhould doubt whether he acts in a judicial capacity in this place: the office of pariſh-clerk ſeems to be much more of eccleſiaſtical conuſance, yet there the ordinary acts only miniſterially, and *mandamus's* are often granted.

As to THE THIRD POINT, It ſeems very conſiderable, that a *caveat* being entered, and the matter properly depending in the biſhop's court, that ſhould be a temporary bar to any *mandamus*. This is much like the *Caſe of Sir Richard Raines.*

LEE, *Juſtice.* Whether teaching ſchool is a matter of temporal or eccleſiaſtical conuſance has been much litigated, nor do I know whether it has ever been determined; the laſt time this matter came in queſtion, was in the caſe of *Matthews v. Burdett* (*f*).

(*a*) 2. Lev. 222.

(*b*) Sir Rich. Raines' Caſe, 5. Mod. 374.

(*c*) 7. Mod. 143.

(*d*)

(*e*) Sum. 88.

(*f*) Salk. 673.

It has been, indeed, determined to be of temporal cognizance in reſpect to the penalty inflicted by 1. *Jac.* 1. c. 4. (*a*). But that queſtion ſeems not very material in this caſe. The acts requiring a licence to be had neceſſarily imply a power in the ordinary of granting ſuch licence; and in conſequence of that it ſeems they have a diſcretionary power of judging of the qualifications of perſons to be licenſed. In the caſe of *The King v. Wallis* (*b*), on the like application for a *mandamus* to grant a licence to a ſchoolmaſter, Lord Parker, *Chief Juſtice*, Powis and Eyre, *Juſtices*, held that ſuch *mandamus* would lie; Pratt *contra*; but it appearing the right was in controverſy in a proper manner, it was denied until that matter was determined. There are certainly ſeveral authorities, ſince that caſe in *Styles*, that a *mandamus* will lie in this caſe. Of late, *mandamus's* have been carried much farther than formerly.

Lord Hardwicke, *Chief Juſtice*. I make no doubt but the ordinary has power of judging of the perſon; but it is very material whether that is founded on the canon law, or any implied authority by the ſeveral acts of parliament. If the firſt, this Court has nothing to do in it, but the party muſt take his remedy by appeal to ſome ſuperior eccleſiaſtical court; but if he derive his power from the temporal law, he muſt proceed according to the limitations annexed to it; and we are judges whether that power is properly executed or not.

Adjourned.

(*a*) Carth. 464. (*b*) Trinity Term, 12. *Geo.* 1.

The King *againſt* Dr. Betteſworth.

Caſe 242.

The Court will not ſuperſede a *mandamus* to compel probate, if it iſſued before the will was litigated.

Mr. TAYLOR moved to ſuperſede a *mandamus* to the prerogative court to compel the probate of a will *quia erronicè emanavit*. Upon producing an affidavit, and the proceedings in the court below, whereby it appeared the will was litigated there, and to prove that the Court would ſuperſede a *mandamus* under thoſe circumſtances, and not require a return to be made thereto, he cited *Sir Richard Raines' Caſe*, 5. *Mod.* 374.

S. C. 2. Fa n. 420.
S. C. Andr. 365.
S. C. 2. Stra. 857.
S. C. 1 Barn. 291. 331. 424.

Lord Hardwicke, *Chief Juſtice*. It appears the litigation of the will was ſubſequent to the time of the *mandamus* iſſued, and in that reſpect diſtinguiſhable from the caſe cited, as this writ can hardly be ſaid to have iſſued erroneouſly, when at that time there was no controverſy about the will; and when there is none, a *mandamus* properly lies.

There was a rule to ſhew cauſe; which was afterwards made abſolute by conſent of the other ſide; and the *mandamus* went.

The

Caſe 243. The King *againſt* Refit.

Indictment for extortion.

S. C. 2. Barn. 436.

S. C. Cun. 36.

THE DEFENDANT having been found guilty of extortion, for inſiſting on extravagant fees from ſeveral tradeſmen, as ſervant to *Juſtice Robe*, clerk of the king's market;

MR. STRANGE *moved in arreſt of judgment*, that the indictment was for taking fourteenpence for examining, marking, and ſealing, fourteen pots; and though the defendant could not be juſtified in taking any fee for examining, yet it appears by 4. *Inſt.* that for marking and ſealing there is a fee due; and the offence being charged entire, the judgment is ill.

THE COURT were clearly of opinion, that the defendant being found guilty generally of the indictment, they could not enter into any enquiry of that nature now.

And the objection was overruled.

Caſe 244. The King *againſt* The Archbiſhop of Canterbury.

Motion for a *mandamus* refuſed, becauſe copies of the ſtatutes were not produced.

MR. KETTLEBY moved for a *mandamus* to be directed to the archbiſhop to admit *Mr. John Anſtis* to a fellowſhip of *All Souls College*, in right of his being related to THE FOUNDER, according to the proviſion of the ſtatutes, the power of ſupplying this vacancy having devolved to the archbiſhop, as is directed by the ſtatutes when there has been no election by the College within the time preſcribed for that purpoſe.

But the original ſtatutes not being produced, nor any copy regularly atteſted,

THE COURT denied the motion, without entering into the queſtion, Whether a *mandamus* would lie or not? And though it appeared by affidavit, that application had been made to the College to inſpect the ſtatutes, and take a copy, and that denied, yet THE COURT ſaid, they could give no relief by rule or otherwiſe, there being no proceedings depending in that court; but the remedy muſt be by bill of diſcovery in equity.

Caſe 245. The King *againſt* Ellams.

The Court will grant leave to amend an information *quo warranto*, if it will not tend to delay the trial.

S. C. 2. Bar. 402. 440. 445.

INFORMATION in the nature of a *quo warranto* againſt the defendant as mayor of *Cheſter*. The defendant, in his plea, ſet out the charter of incorporation in the time of *Henry the Seventh*, by which it appeared, that the citizens of the city, inhabiting within the city and the hamlets and ſuburbs thereof, are to nominate two aldermen, one of which is to be elected mayor by the mayor, aldermen, and ſheriffs; and then ſet out the nomination of himſelf by a

The King againſt Ellams.

major part of the citizens, not ſaying anything about their inhabitancy. To this there is a demurrer, and iſſue taken on the allegations in the plea of his being an alderman; which iſſue went down to trial, but no trial was had thereon, by reaſon of a challenge to the array.

Mr. Hussey moved to amend the plea with reſpect to the omiſſion of alledging the inhabitancy. It is no unuſual thing for the Court to allow amendments, even in indictments and informations for miſdemeanors (a). The caſe of *the King v. Hayes* (b) was an indictment for forgery; and after trial and ſpecial verdict found, the Court gave leave to amend the record, which was *perochia*, and to make it *parochia*. Theſe informations are in the nature of civil ſuits; and by the 9. *Anne* it is expreſsly provided, that the ſtatutes of Jeofails ſhall be extended to them. In the caſe of *Wilks v. Rich* (c), which was, Covenant not to act after ſuch a day; and in alledging the breach it was laid, that he acted *poſthac*; to which there was a demurrer; and after argument thereon the Court gave the plaintiff leave to amend. *The Malmſbury Caſe* (d) was an information in the nature of a *quo warranto* againſt that corporation, and a miſtake in the name of the corporation was pleaded in abatement, and that was rectified on a motion to amend. In *Foot v. Prouſe* (e), a miſtake in the defendant's name was ſet right after a plea in abatement. In *Collins v. Cole* (f) there was an amendment in a joinder in demurrer after a writ of error brought in the exchequer-chamber. So alſo in the caſe of *Bearcroft v. The Hundred of Burnham Stone* (g), in which a very material caſe is cited.

Mr. Bootle *ſenior*. The caſe of *The King v. Hughes* (h) was an information in the nature of a *quo warranto* againſt the *Mayor of Liverpool*; the defendant's plea ſtated the charter, which required the election of the mayor to be by the mayor, bailiffs, and burgeſſes, and to be ſworn before the late mayor and bailiffs; then the plea ſet out, that he was ſworn before ſuch a one mayor, and two other perſons then bailiffs; but the Chriſtian name of one of the bailiffs was miſtaken, *Peter* for *Robert*, which would certainly have been a fatal variance at the trial, and the information was at iſſue, and carried down to trial; and upon debating this matter by Counſel on both ſides, before Lord Raymond at his chambers, he gave leave to amend.

Mr. Strange. Nothing is more common than after demurrer and joinder in demurrer to give leave to amend *a general memorandum*, where it appears that the cauſe of action is ſubſequent to the time of the action brought. *Ruſſel v. Martin* (i) and *Ruſſel v. Thorpe* (k). So

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(a) 3. Cro. 144.

(b) Hilary Term, 1. *Geo.* 2. 1. Bar. K. B. 142.

(c) Mich. Term, 6. *Anne*, 11. Mod. 133.

(d) Eaſter Term, 9. *Anne*, 8. Mod. 55.

(e) 1. Stra. 625. Annally's Rep. 44. 3. Brown. P. C. 167.

(f) Mich. Term, 10. *Anne*.

(g) 3. Lev. 347.

(h)

(i) 1. Stra. 583.

(k) Eaſter Term, 10. *Geo.* 1.

THE KING *againſt* ELLAMS.

when records of *niſi prius* are made up, and the cauſe carried down to trial. *Ducheſs of Marlborough v. Widmore* (a). *The King v. Charleſworth* (b) was an indictment for forging a warrant of attorney to confeſs a judgment, and leave was given to amend a miſtake in the warrant on the day of trial, though that was the ground of the charge. In *Crockett v. Jones* (c), the ſtatute of Limitations was pleaded in *aſſumpſit*; and the plaintiff replied, *quòd actio incepta fuit tali die* within the ſix years; to this there was a demurrer; and after the Court, upon argument thereon, had given their opinion that they ought to have ſhewn that the action was continued down, and have ſet forth the continuances, the Court gave leave to make that amendment. *Show.* 273. 29. *Eaſter*, 3. *Geo.* 2. *Dunmold v. Aldworth*.

MR. BOOTLE *junior*. In *Ball v. Harper* (d), the plea concluded to the country, which ought to have been with an averment; and after demurrer thereto it was amended.

MR. PARKER *on the other ſide* cited *Hatton v. Walker* (e), where, in the concluſion of the plea, it was ſaid, "*ſed actionem*" inſtead of "*ſi actionem ſuam habere debeat*," and to this a demurrer, and this miſtake aſſigned for cauſe, and upon motion to amend, the Court would not grant it; but being afterwards ſatisfied that the draft of Counſel was right, and that this was only an error in tranſcribing, the amendment indeed was allowed, upon the authority of *Brownjohn v. Doily* (f), where, in replevin and avowry for rent, the diſtreſs was laid to be prior to the time the rent became due; and after demurrer and a *concilium* thereon, the draft of the Counſel appearing to be right, the Court gave leave to amend.

LORD HARDWICKE, *Chief Juſtice*. It appears by the words of the 9. *Anne*, that trials on informations of this kind are to be had in the moſt expeditious manner, as they are brought to try the right to offices determinable in a year or other ſhort time; and therefore any attempts to prolong the time of trial muſt meet with no encouragement. It would be proper that ſome ſatisfaction ſhould be given to the Court, by affidavit, that nothing of that kind is intended here, but that it was a miſtake only in the perſons concerned in drawing the plea; but it would be irregular to read any affidavit of that kind on ſhewing cauſe, as the preſent caſe is.

The rule was diſcharged, with liberty given to make an original motion for amending another time.

(a) Trinity Term 1730. Fitzgib. 193. S. C. 1. Bar. 408. 418. S. C. Sayer, 97. 235. S. C. 2. Strange, 890.

(b) 2. Stra. 871.

(c) Eaſter Term, 12. *Geo.* 1. 2. Ld. Ray. 1441. S. C. 2. Stra. 734.

(d) Hilary Term, 12. *Geo.* 1.

(e) Mich. Term, 3. *Geo.* 2. 1. Bar K. B. 213. 220. S. C. 2. Stra. 846.

(f) Hilary Term, 8. *Anne*.

TRINITY

TRINITY TERM,

The Seventh of George the Second,

IN

The King's Bench.

Philip *Lord* Hardwicke, *Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
William Lee, *Eſq.*
John Willes, *Eſq. Attorney General.*
Dudley Ryder, *Eſq. Solicitor General.*

The King *againſt* Ellams.

Caſe 246.

In what caſe an information *quo warranto* may be amended at common law.

S. C. 2. Stra. 976.
S. C. B. R. H. 42.
S. C. Cun. 39.
S. C. 2. Barn. 440. 445.

UPON ſhewing cauſe on another rule why this amendment ſhould not be made, it appeared, by affidavits on the defendant's part, that in this miſtake there was no affectation of delay, but that it was occaſioned merely by inadvertency and the hurry of buſineſs which the Counſel who peruſed it were then in (*a*); and to obviate an objection, that the loſs of a trial in this caſe was a reaſon why this amendment ſhould not be allowed, it appeared, that an iſſue was taken on one fact charged in the plea, and carried down to trial, and the array there quaſhed by the defendant, the *venire* being directed to, and the jury returned by, one who was a freeman of *Cheſter*; and that had iſſue been joined on the other fact to which the demurrer was, that would have met with the ſame fate, as it was liable to the ſame objection.

Some of the caſes cited againſt the amendment were, *Poph.* 128. 144. *Syd.* 55. *E contra*, 1. *Vent.* 221. 2. *Saund.* 401. *Cro. Car.* 147.

Lord Hardwicke, *Chief Juſtice.* This amendment muſt be grounded at common law, no proviſion being made for any ſuch amendment by ſtatute. The practice of the Court is much altered in this reſpect. Antiently no amendment was ſuffered after entry on record. The common form of ſaying on ſuch motions, "all is on "paper," is a proof of it; and the caſes of amendments are not reducible to the general rules laid down. For, FIRST, It is ſaid there muſt be ſomething to amend by; but that rule holds not in amendments before judgment, however it may after; and there are many caſes to the contrary; which have been cited on this occaſion.

(*a*) See the caſe of Rex *v.* Armſtrong, And. 109.

Secondly, It is ſaid, errors in law are not amendable, but only miſpriſions of clerks; but it is clearly otherwiſe. 2. *Saund.* 401. 2. *Vent.* 221. 2. *Mod.* 167. In *Moſtyn v. Totty*, 3. *Geo.* 1. in the exchequer, which was an action for a nuſance; to which there was a demurrer to the declaration; and joinder in demurrer; leave was given to withdraw the demurrer, and to plead the general iſſue.

Thirdly, Amendments are ſaid to be allowable only where no trial has been loſt; but I know no caſe where that has been laid down. A great number of amendments have been made after arguments on demurrer, where trials muſt generally have been loſt.

Fourthly, It is ſaid, that ſome extraordinary amendments have been allowed, but that has been where the party would otherwiſe be deprived of his action and loſe his right; as in the caſe of the *Dutcheſs of Marlborough v. Widmore* on the ſtatute of Limitations, and the caſe cited in 3. *Lev.* 347. which was an action on the ſtatute of Hue and Cry, which muſt be brought within a year after the robbery; but ſurely the loſs of an office is of as great conſequence, and deſerves as much favour.

It is ſaid, that this is a criminal ſuit; but I cannot ſay it is ſuch; it ſeems indeed to be ſo in reſpect of the fine which muſt be ſet on the conviction, but then in other reſpects it is merely civil; a relator is to be appointed by ſtatute; coſts are to be paid; and a method is directed for the trial of a right; and ſeems not to differ from treſpaſs, where the defendant is fined.

But ſuppoſing it to be a criminal ſuit, that would make no difference in amendments at common law; there is no diſtinction between one and the other; that difference is founded merely on the ſtatute of Amendments and Jeofails, by the words *plaintiff and defendant*, and has therefore been confined to civil ſuits. The queſtion then is reduced to this point, Whether this caſe is under ſuch circumſtances as may induce the Court to exerciſe their diſcretion in ordering this amendment to be made? No trial appears here to have been loſt, for the contrary appears on affidavits. I was very doubtful of granting this amendment until ſatisfaction was given to the Court that no delay was intended in the caſe; which matter, is now ſufficiently cleared up. Iſſue in this caſe might have been joined on the plea, and if a verdict had been given for the defendant, advantage might have been had of this miſtake by writ of error; for though in indictments it is neceſſary to give the attorney-general ſome ſatisfaction of a probable error, in order to obtain his *fiat* for the allowance of the writ of error, yet it is not ſo where a right is concerned, as in the preſent caſe.

The other Judges concurred *in omnibus.*

But Lee, *Juſtice*, ſaid, he was at firſt a little in doubt on the diſtinction taken by Holt, *Chief Juſtice*, in *Salk.* 50.; but ſaid, that rule will not hold, as appears by ſeveral authorities. The anonymous caſe in 2. *Mod.* 167. is expreſsly otherwiſe.

The rule for the amendment was made abſolute.

Colonel

Colonel Pitt's Caſe.

Caſe 247.

IN *Eaſter Term* laſt, SERJEANT DARNELL moved to diſcharge the defendant out of execution, upon affidavit that he was a member of the late parliament, and verified that fact by producing the return to parliament, which was diſſolved on the eighteenth of *April*, and the defendant taken in execution on the twentieth. It was inſiſted, that his privilege entitled him to a reaſonable time *eundo et redeundo*, and that two days cannot be looked upon as ſuch; and cited 2. *Lev.* 72. Upon this a rule was granted to ſhew cauſe.

If a member of parliament be arreſted two days after the diſſolution of parliament, the court of king's bench will diſcharge him on motion, without filing common bail.

And the ſame Term, upon ſhewing cauſe, the caſe was opened thus:

Colonel Pitt being in cuſtody at the ſuit of ſeveral perſons who had actions depending againſt him in the common pleas, was removed by *habeas corpus* into the king's bench priſon at the ſuit of ſeveral perſons in actions brought in the king's bench againſt him, and there charged by many of his creditors with declarations, who now oppoſed his diſcharge.

S. C. 2. Stra. 985.
S. C. Comy. 444.
S. C. Fort. 159, 342.
S. C. B. R. H. 28. 37.
S. C. 2. Barn. K. B. 422. 433, 448.
S. C. Cun. Rep. 16.
1. Black. Com. 165, 166.

MR. GAPPER *for one of the plaintiffs*, who had delivered a declaration to him in cuſtody, inſiſted, that this method of application for his diſcharge was improper, for he ought to proceed by *writ of privilege*, as in *Dyer*, 59. *b.*; that the defendant, by removing himſelf by *habeas corpus* into this court, had thereby waived his privilege, if he had any, and might now be charged in cuſtody.

MR. WYNNE *for another plaintiff.* The principal caſe in 2. *Lev.* 72. relates only to peers. The privilege of members during the parliament cannot be denied. All the Books are, "*durante parliamento*" or "*durante ſeſſione* (*a*)." In 4. *Inſt.* 46. there is an inſtance of wages allowed for no more than twenty-one days in the whole, "*pro expenſis ſuis veniendo ad parliamentum ibidem morando, &c. exinde ad propria redeundo.*" *Sir Thomas Thorpe* (*b*), though ſpeaker, was taken in execution during a prorogation of parliament, and could not obtain his diſcharge when the parliament met again, but the Houſe choſe another ſpeaker. The removal of himſelf by *habeas corpus* is a waiver of his privilege (*c*). But however, if this privilege be allowable, yet it is no otherwiſe ſo than by pleading (*d*).

MR. BINNEY *for another creditor* cited *Crompton* (*e*) and *Coke* (*f*), to ſhew, that privilege continued no longer than during parliament. He inſiſted, that the defendant had particularly waived his privilege in this caſe, he having deſired his creditor to charge him in cuſtody with a declaration, and told him it would be for the advantage of them both; which was verified by affidavit.

(*a*) Dyer, 60. 4. Inſt. 48. Bro. Abr. "Privilege," 56.

(*b*) Hackwell's Modus Tenendi Parliamentum, 63. 208.

(*c*) Dyer, 33. Bro. Abr. "Privilege," 25.

(*d*) Dyer, 60. Latch, 48.

(*e*) Crompton's Juriſdict. of Courts, page 11.

(*f*) 4. Inſt. 24.

COLONEL PITT'S CASE.

MR. DENNISON *for another.* Privilege in this caſe ought to have been pleaded, and a writ of privilege annexed to his plea (*a*). A lord of parliament muſt plead his privilege (*b*).

CHAPPLE, *Serjeant, on the other ſide.* Privilege of members of parliament is a preſcriptive right (*c*), and it never was doubted as to arreſts on *meſne proceſs*, whatever it might be in caſe of an execution (*d*). The ſtatute 1. *Jac.* 1. c. 13. ſuppoſes members liable to be diſcharged out of execution in right of their privilege, and ſubjects them to be taken in execution when that ceaſes. In *Thorpe's Caſe* (*e*), the time of privilege might be out, for anything that appears to the contrary. In 1. *Brownl.* 91. no objection there taken is to the allowance of forty days privilege before and after, &c. The ſtatute 6. *Hen.* 8. 16. requires the attendance of members to the end of the parliament, and time therefore ought to be allowed after the diſſolution of it for returning to their reſpective habitations. The law of parliament is part of the law of the land, and muſt be obſerved in all courts (*f*). This is a proper method of application without pleading the privilege, and not unlike the diſcharge upon motion of a perſon arreſted upon *Sunday*; if no advantage can be taken but by pleading, the party may be deprived, in many inſtances, of that benefit for a long time.

MR. STRANGE *for the defendant.* Some things may be left out of the caſe; as that the defendant adviſed one of the parties to charge him with a declaration; that being immaterial, it not being in the defendant's power to waive his privilege, if he is really entitled to it, as every member of the houſe and the public is intereſted in it. It is ſaid, he was only charged in cuſtody at the ſuit of theſe plaintiffs, and not arreſted originally by them, and therefore as to thoſe ſuits his privilege will be no protection; but ſurely if the original arreſt was wrong and illegal, whatever is done in conſequence of that muſt fail too. It has not been made out to the Court, that the defendant removed himſelf by *habeas corpus*; it might be at the ſuit of ſome of his creditors; and if ſo, there is no pretence to ſay that he has done anything which amounts to a waiver of his privilege. The principal points are two: THE FIRST, Whether the defendant be entitled to his privilege? THE SECOND, Whether this be a proper method of claiming it? It is ſaid, that privilege determines with the diſſolution of the parliament; but it is plain privilege has always been; and as prorogations are not very antient, it being uſual formerly to have frequent new parliaments, ſometimes two or three in a year, ſuch privilege muſt be ſuppoſed to ſubſiſt after the diſſolution of them. The words "*ad propria redeundo,*" in 4. *Inſt.* 46. are very material, as it ſuppoſes them to be in the ſervice of the public until they are returned home. So PEERS are empowered by CHARTA DE FORESTA *eundo et redeundo* to kill two or three deer in the

king's

(*a*) 1. Sid. 42. 1. Keb. 3. 13.

(*b*) Sid. 29. Vidian's Ent. 93.

(*c*) Dyer, 60.

(*d*) Moor, 57. Salk. 150.

(*e*) Moor, 340.

(*f*) Salk. 509.

Colonel Pitt's Case.

king's foreſt. I do not find any authority where it is ſettled that four days is the time allowed for privilege; but that a reaſonable time is, appears from many books relating to parliament (*a*). A witneſs is privileged *redeundo* (*b*); the ſame reaſon holds in the caſe of a member, &c. I know of no precedent of a diſcharge of a member on motion; but as the whole fact, as to his being a member, the time of the diſſolution of parliament, and of his being taken, is now diſcloſed to the Court, and admitted to be true, there can be no occaſion for putting the party to the neceſſity of pleading this privilege; and this method of proceeding is agreeable to the practice of the Court in many inſtances.

Lord Hardwicke, *Chief Juſtice.* There can be no doubt but a member may waive his privilege under his hand, or by ſubmitting to any actions or proceedings therein; and in ſuch caſes THE HOUSE will not ſuffer him to reſume his privilege, unleſs the ſervice of THE HOUSE requires his aſſiſtance. I deſire, therefore, that it may be laid before the Court, whether the *habeas corpus* was procured at the defendant's inſtance or at the inſtance of any of his creditors.

This caſe was adjourned for the purpoſe of affording the Court an opportunity of conſulting the reſt of the Judges on the ſubject; it being thought a matter of the firſt moment, not merely to the defendant in particular, but to the kingdom in general.

At another day, Lord Hardwicke, *Chief Juſtice*, ſaid, this caſe had been argued before ALL THE JUDGES IN ENGLAND, except Baron Carter, at *Serjeants Inn*, as a matter of conſequence to the rights and privileges of parliament on the one hand, and on the other to the property of honeſt creditors. AND WE ARE UNANIMOUS IN OPINION, that members of parliament are privileged *eundo et redeundo*; for what time they are ſo privileged it is not neceſſary for us to determine, it appearing that *Colonel Pitt* was taken no more than two days after the parliament was up, which we think cannot be a convenient time. THE GREAT QUESTION will be, Whether advantage can be taken of this privilege on motion? or, Whether it is not neceſſary to be on record by writ of privilege under the Great Seal? WE ALL AGREE, that a writ of privilege is proper; and whether the other way is not ſo too, there is ſome difference of opinion amongſt us. There has been no authority cited of any ſuch diſcharge on motion (*c*).

Let the rule be enlarged until next Term, with liberty to the defendant to bring his *writ of privilege*. If he inſiſts on proceeding in the preſent application, he ſhall have our opinion upon the matter next Term.

(*a*) Elſing's Antient Method and Manner of Holding of Parliaments, 2d part, 103. Sir Thomas Shirley's Caſe; and in the ſame Book, 108. Mr. Martin's Caſe. Another Book, called, The Opinions of Sundry Learned Counſel, Dodderidge, &c. concerning the Power and Privilege of Parliaments. In the Preface to that Book, wrote by Dodderidge, it appears there is ſuch privilege.

(*b*) Stiles, 395. 1. Vent. 11.

(*c*) See Cheſter *v.* Upſdale, 1. Wilſ. 278.

COLONEL PITT'S CASE.

In the preſent *Trinity Term*, the defendant having applied to the court of chancery for a *writ of privilege*, and ſome difficulties ariſing there for want of ſufficient notice to his ſeveral creditors at whoſe ſuit he was in cuſtody, and THE CHANCELLOR and THE MASTER OF THE ROLLS, who aſſiſted on that occaſion, not ſeeming to think very favourably of the application there, he now reſorted to the court of king's bench for their opinion, as the caſe ſtood on the former proceedings.

LORD HARDWICKE, *Chief Juſtice*, now delivered the reſolution of ALL THE JUDGES OF ENGLAND to the effect following: After having ſtated the fact, and repeated the former reſolution, he ſaid, all the Judges had met again, except DENTON, *Juſtice*, who was ill, but had certified his opinion by MR. JUSTICE LEE, and that ten of them were of opinion that the defendant was entitled to his diſcharge on *motion*; that REYNOLDS, *Chief Baron*, doubted; and that BARON THOMPSON was inclined to think he could not be diſcharged on motion, though he did not give any poſitive opinion.

There are two conſiderations in this caſe: FIRST, How the law ſtood as to the matter before the ſtatute of 13. *Will.* 3. c. 3. SECONDLY, Whether that act has made any alteration.

As to THE FIRST, all the Judges are of opinion, that before that act the regular way was to proceed by *writ of privilege* under THE GREAT SEAL for the diſcharge of any member of parliament by any of the courts of *Weſtminſter-Hall*, not entering into any enquiry as to the diſcharge of any member by the houſe of commons itſelf ſitting the parliament. This writ of privilege was a *ſuperſedeas* to the action, and was ſo pleaded, the concluſion being always, *ſi in placito prædicto ulterius procedere vel cognoſcere velit aut debeat*, as appears by *Prynne's Regiſter of Parliamentary Writs, lib.* 1. *fo.* 666.

As to THE SECOND POINT, ten of the Judges are of opinion, that two alterations are made by the act: FIRST, That it has taken away the old plea of privilege: SECONDLY, That it has made the execution of the proceſs on any member irregular and illegal.

As to THE FIRST, The act is entitled, "An act for preventing "any inconvenience that may happen by privilege of parliament." The firſt clauſe of the act impowers any creditors to bring actions againſt any member, &c. immediately after any prorogation or diſſolution of parliament, or after an adjournment for fourteen days. This clauſe is in abridgment of the privilege of parliament as it ſtood before this act. Then comes a proviſo only privileging the perſons of members from arreſt during the time of parliament; and then follows the enacting clauſe, which gives a remedy of proceeding againſt members by ſummons and diſtreſs infinite, &c. after prorogation, &c. which concludes with theſe negative words, "ſhall not

"arreſt.

Colonel Pitt's Caſe.

"arreſt or impriſon the body, &c." The proviſion, therefore, made by this act is, that after a prorogation, &c. a member may be proceeded againſt during the time of privilege; the effect of which is, that a member cannot now plead his privilege to the action, that being taken away by the act. To what then can he plead it, not to the *latitat*, *capias*, *&c.* by which he is taken, in avoidance of ſuch proceſs. I know no inſtance where ſuch plea is allowable, unleſs it be expreſsly given by act of parliament, as in the caſe of the Inſolvent Debtors Act, and in the caſe of *Widdrington* v. *Charlton* (*a*), where in an appeal it was held by Lord Parker, where a man is brought in by erroneous proceſs, or one proceſs miſtaken for another, that matter is not pleadable in avoidance of the proceſs. If *Mr. Pitt*, then, is entitled to his privilege from arreſts, and cannot plead as before the act, what other remedy can he have than by motion? and that the more ſtrongly here, becauſe the ſtatute of the 13. *Will.* 3. c. 3. has made this arreſt of his perſon irregular. Two things are done by this act: First, It has inſtituted a new method of proceeding, either by ſummons or diſtreſs infinite, or by original bill and ſummons, attachment, and diſtreſs infinite. Secondly, It has provided expreſsly againſt the arreſt of his perſon; ſo that now this privilege from arreſts is become part of a public act of parliament, which we are obliged to take notice of; and it need not to be certified to us by plea, as before the act, being then of a private nature only; though indeed now we cannot take notice of the perſon's being a member of parliament but by matter of record, which has in this caſe appeared to us by *Mr. Pitt*'s return to parliament, which is the proper method, as appears by *Sir Richard Temple's Caſe* (*b*). And this diſcharge on motion is no new thing, as appears by *Lady Huntingdon's Caſe* (*c*), which was before the act, and yet privilege of peerage as properly pleadable as this privilege, and by *Lord Banbury's Caſe* (*d*). I have a good manuſcript report of that caſe, where it is ſaid, by Holt, *Chief Juſtice*, that if it had appeared he had been ſummoned to parliament, and there was no diſpute as to the identity of the perſon, he ſhould have been for diſcharging him upon motion. And *Lord Mordington's Caſe* (*e*), in the common pleas, when Lord King preſided there; where *Lord Mordington* being a *Scotch* peer, who are all ſince the Union entitled to the privilege of peerage, though not members of the houſe of peers, was diſcharged from an arreſt, and the bailiff compelled to make his ſubmiſſion. This therefore brings it to the common caſe of an arreſt of a perſon who ought not to have been arreſted. Perſons arreſted on a *Sunday*, contrary to the 29. *Car.* 2. are diſcharged on motion. The caſe of ambaſſadors ſervants, under 7. *Anne*, is the ſame. So in the caſe of any irregularity in the ſervice of proceſs under the ſtatute for preventing frivolous, &c. So that we think this diſcharge of *Mr. Pitt* proper, by force of thoſe negative words in the 13. *Will.* 3. And we hold it likewiſe to be a matter of diſcretion

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(*a*) Hilary Term, 11. *Anne.*

(*b*) Sid. 42. Ray. 12.—This caſe is alſo to be found in 1. Keble, 3. 13. 16.

(*c*) 1. Vent.

(*d*) Salk. 512.

(*e*) Fort. 165.

COLONEL PITT'S CASE.

cretion in the Court, whether they will relieve on motion or pleading in caſe of privilege. There are ſimilar caſes to the preſent, the arreſt of a juror, a witneſs, or a party attending his own ſuit; for that privilege is the privilege of the court on which they attend. Antiently writs of privilege were ſued-out, as appears by *Raſtal*, *tit.* "*Privilege*;" and though that is a proper method, yet the conſtant practice now is to diſcharge on motion, and that diſcharge too as well by the Court out of which the proceſs iſſued as by the Court that the juror, &c. was attending; as was done in the caſe of *Hatch v. Bliſſet* (*a*): *Mrs. Bliſſet* the defendant having been arreſted in her return to *Portſmouth* from *Wincheſter*, where ſhe had been attending a cauſe of her own, the court of king's bench, out of which the proceſs iſſued, diſcharged her on motion the next Term, and judicially took notice of the privilege belonging to the court of *Niſi Prius*.

The defendant was accordingly diſcharged.

(*a*) Trinity Term, 13. *Ann.* Gilbert, 308.

Caſe 248.

Colmer *againſt* Clark.

A bond reſtraining the obligor from carrying on his trade in a *particular place* and for a *limited time* is good.

Cro. Eliz. 872.
Show. 2.
Eſpin. "Debt," 183.

WRIT OF ERROR on a judgment in the common pleas for the plaintiff there, on demurrer to the declaration, which ſet forth, that in conſideration the plaintiff, who was *a tally-man*, would take the defendant into his family, and inſtruct him in the trade, with a proviſion of meat, &c. and an allowance of twenty pounds wages a-year, the defendant promiſed to ſerve him for five years, and not to exerciſe the trade himſelf for ſeven years after that time within the city and liberty of *Weſtminſter* and bills of mortality, which agreement was by articles under hand and ſeal. The breach aſſigned was, the exerciſe of the trade within, &c.

The court of common pleas held the agreement good, and agreeable to the rules of law, the reſtraint from the exerciſe of trade being confined to a particular diſtrict, and founded on a valuable conſideration.

Nobody appearing in the king's bench for the plaintiff in error, the judgment was affirmed.

The caſes cited for the defendant in error by MR. BICKNELL were, the caſe of *Cheeſeman v. Nainby* (*a*), about eight years ago, where this point was ſolemnly determined in the common pleas, which judgment was affirmed on a writ of error in the king's bench, and afterwards in the houſe of peers; and the caſe of *Mitchell v. Reynolds*, in LORD PARKER's time, on the ſame point (*b*).

(*a*) Cheeſman *v.* Rainby, Fort, 297. S. C. 2. Stra. 739.

(*b*) 10. Mod. 27. 85. 130. Fort. 296. 1. Peer. Wms. 181.

Tryon

Tryon *againſt* Carter.

Caſe 249.

To debt on bond, payable 5th *December*, the defendant pleaded payment on *that day*; replication non-payment on *that day*; and the verdict finds non-payment on the 25th *December*, and *a repleader* awarded.

S. C. 2. Stra. 994.
S. C. Cun. 71, 106.
S. C. cited 1. Burr. 302.

WRIT OF ERROR on a judgment for the plaintiff in the common pleas in debt on a bond. On *oyer* of the condition it appeared, that the money was made payable the fifth of *December*, and payment was pleaded on that day. The plaintiff replied, it was not paid on that day, and iſſue was joined thereon, and a verdict for the plaintiff, finding that the defendant did not pay it on the twenty-fifth of *December*, as is alledged in the replication.

MR. PARKER, *for the plaintiff in error*, inſiſted, that this was ill, the day of payment being made part of the iſſue. This is a negative pregnant (*a*). Payment before the day could not have been given in evidence on this ſpecial iſſue, though it might on a general *ſolvit ad diem*. Beſides, the verdict finds that he did not pay on the twenty-fifth, which is entirely immaterial.

MR. STRANGE *on the other ſide*. As to the objection to the verdict, that defect is ſupplied by the ſubſequent words. It is found, that he did not pay on the twenty-fifth of *December*, as is alledged in the replication; there is no ſuch allegation before as payment on the twenty-fifth, but on the fifth; that therefore muſt be rejected, and then it will be good. Suppoſing then the verdict and iſſue conſiſtent, then this is no more than payment at the day pleaded, and payment before might as well be given in evidence on this iſſue as the other.

LORD HARDWICKE, *Chief Juſtice*. The objection taken to the verdict is properly anſwered. The caſes cited for the plaintiff in error are, where the time at which the parties title accrued is reſtrained to a particular day, and that certainly is ill. But in the caſe of a bond conditioned for the payment at a certain day, there can properly be no legal performance of the condition but by payment at the day. Payment before the day may indeed be given in evidence on *ſolvit ad diem*, but that goes upon this reaſon, that the money is looked upon as a depoſit in the hands of the obligee until the day comes, and then it is actual payment. Payment before the day might well have been given in evidence on this iſſue.

It was then obſerved by MR. PARKER, that the condition is for the payment of the money and intereſt on or before the fifth of *December*.

HARDWICKE, *Chief Juſtice*, thought this would make a very material difference, becauſe, in ſuch caſe, there might have been a legal performance of the condition, by payment, at any time before; and that this would bring it to the caſe where iſſue is taken on a plea of payment at a time before that which is limited by the condition for payment, which is certainly an immaterial iſſue, if found againſt the pleader.

(*a*) Cro. Jac. 202. Yelv. 122. 2. Mod. 183, 184.

Mr. Strange. The defendant, by pleading payment on the fifth of *December*, admits no payment was made before that time.

Lord Hardwicke, *Chief Juſtice*. The plaintiff muſt make out his own caſe, and ſhew a breach of the condition, without the aid of the defendant's plea.

Lee, *Juſtice*, was of opinion, that non-payment before the fifth of *December* was admitted by the plea, and that is an anſwer to the objection.

Adjournatur.

Caſe 250.

The King *againſt* Pritchard.

"Juſtices of our "county-palatine of *Lancaſter*," and "juſtices at "*Lancaſter*," ſhall be intended to mean the ſame perſons.

S. C. Cun. 77.

A VERDICT having been obtained againſt the defendant at the aſſizes at *Lancaſter*, in an information in the nature of a *quo warranto* to enquire by what right he held the office of bailiff of *Liverpool*, amongſt many other exceptions taken in arreſt of judgment theſe three were much inſiſted on:

The first was, That the *mittimus* is directed "to the juſtices "of our county-palatine of *Lancaſter*," and in the *poſtea* they are only named "juſtices at *Lancaſter*;" ſo that the commiſſion does not appear to be executed by the perſons to whom it was directed; for "juſtices at *Lancaſter*" may mean juſtices of the peace there.

The second was, That one *William Hill* is returned in the panel annexed to the *venire*, and in the *habeas corpora* he is named *William Kell*.

The third was, That this being a ſpecial jury, their names ought to have been inſerted in the body of the *habeas corpora*, and not on a panel annexed, according to the late Jury Act, the caſe of ſpecial juries and trials at bar being excepted out of that act; and therefore the antient method, of inſerting their names in the *habeas corpora*, ſhould have been obſerved.

At another day, on ſhewing cauſe, it was inſiſted,

As to the first objection, that it is the eſtabliſhed practice and uſage of thoſe courts to deſcribe the juſtices in this manner; and many precedents to this purpoſe were laid before the Court, that *juſtices of peace* could not be intended here, the deſcription of their commiſſion being very different.

Naming a juror *Hill* in the panel, and *Kell* in the *habeas corpora*, is immaterial.

As to THE SECOND OBJECTION, An affidavit was read that *Hill* was the perſon ſtruck by the Maſter, and his name miſtaken only in the *habeas corpora*; that it comes to the common caſe where twenty-three jurors only are returned; which is not fatal, eſpecially here, it appearing that he was not one of the perſons who tried the information (*a*). The defect, if any, is aided by the 18. *Eliz.* c 13. and the 21. *Jac.* 1. c. 13. as it is made amendable.

(*a*) Cro. Eliz. 586. Cro Jac. 647. Cro. Car. 223. 5 Rep. 37. 42.

As to THE THIRD OBJECTION it is ſaid, that it did not appear upon record that there wsa ſpecial jury; for though the title of the panel annexed to the *habeas corpora* is, "the names of the ſpecial "jurors returned," yet that by no means implies any ſuch thing, it may be conſtrued only ſuch particular perſons; and if it be not to be taken as a ſpecial jury, then it being only a want of a ſufficient number of jurors is within the reſolution of *Gardiner's Caſe*, 5. *Co.*

In the record of an information *quo warranto*, it is ſufficient if the names of the ſpecial jurors are inſerted in *the panel*, and annexed to the *habeas corpora*.

LORD HARDWICKE, *Chief Juſtice*. We muſt preſume "juſtices "of our county-palatine of *Lancaſter*" and "juſtices at *Lancaſter*" to be the ſame perſons. Theſe are ſuperior courts, and we take notice of their ſtile. This is the ſame as "our juſtices at *Weſtminſter*." But laying that out of the caſe, we are bound by the precedents in *the Bewdley Caſe* (*a*); there, though the act required the jury to be returned *de corpore comitatûs*, and the practice having been to return them *de vicineto*, the Court would not break into ſuch an eſtabliſhed rule and uſage, but held it well, in contradiction to the act, to avoid the general ill conſequence which would have attended a contrary reſolution.

As to THE SECOND OBJECTION, If there is any occaſion for an amendment under the ſtatute 21. *Jac.* 1. c. 13. it muſt be in the court where the proceſs iſſued, not here; but this caſe is not within that act, the words there being, "the names of the jurymen "who *tried* the cauſe." *Hill* is not one of them here; and this ſhews the ſenſe of the Legiſlature, that there is no occaſion for amendment of the names of any jurors who did not try the cauſe. This comes clearly within *Gardiner's Caſe*. The ſecond objection, therefore, is of no weight, becauſe *Hill* was not one of the jurymen who tried the cauſe.

THE THIRD OBJECTION may be conſidered two ways:

FIRST, Whether this is to be taken to be a ſpecial jury by virtue of the words "the names of the ſpecial jurors returned." Special jury before the late ſtatute was no legal term; ſince the ſtatute, indeed, it is a term of law; taking it, therefore, to be a ſpecial jury, this muſt be a *habeas corpora* at common law, the caſes of ſpecial juries being excepted out of the act. The queſtion then is, Whether this is good after verdict? Original writs are tied up to certain forms in *the Regiſter*; in judicial writs it is otherwiſe. There is no material difference between inſerting the jurors names in the body of the writ, and annexing a panel of their names to the writ. Suppoſing it, however, a defect in form, it is aided by the 18. *Eliz.* c. 13. the ſtatute 9. *Anne*, c. 20. extending that act to informations of this kind.

SECONDLY, Taking theſe words "the names of the ſpecial "jurors returned" not to be a ſufficient foundation for us to conſtrue this a ſpecial jury, then it comes to the caſe of a leſs number returned than ought to be; and for anything that appears to the contrary, that may be by the direction of the Judge, in purſuance of the power given him by the ſtatute.

(*a*) 1. Peer. Wms. 207. 2. Ld. Raym. 1359.

THE KING *againſt* PRITCHARD.

PAGE, *Juſtice.* The reaſon why the miſtake of a juror's name in a *habeas corpora* is bad is, becauſe one being ſworn who ought not, the trial is by eleven jurors only. And he inclined to think, the omiſſion in not inſerting the jurors names in the *habeas corpora* is form only, and aided by the 18. *Eliz.* c. 13.

PROBYN, *Juſtice.* The juſtices of counties-palatine are under two commiſſions: One under the great ſeal in the trials of cauſes which are ſent down from the courts of *Weſtminſter-Hall* by *mittimus*; and the other under the ſeal of the county-palatine for cauſes ariſing within the county-palatine, and tried there in bank. The deſcription of the juſtices acting in either of thoſe capacities is the ſame, and there is no room to preſume there are any other. The *habeas corpora* is the act of the Court; the return of the panel the act of the ſheriff. If the panel was annexed at the time of ſealing the writ, the panel might be taken as part of the writ, which I think cannot be, as the annexing it is the act of the ſheriff.

LORD HARDWICKE, *Chief Juſtice.* The writ takes notice of, and refers to the panel, and ſeems to be part of the writ.

PROBYN, *Juſtice.* As this power of the Judge of ordering a fewer number of jurors than forty-eight comes in by way of exception to the general proviſion of the act, the execution of that power ought to appear on record.

LEE, *Juſtice.* I doubt whether this third exception is proper on motion in arreſt of judgment. It is true, it appears by the record that leſs than forty-eight are returned, but that poſſibly was by the order of the Judge, and then there is no ground for the objection; this therefore is only proper to be enquired into on a motion for a new trial, where the facts will be laid before the Court. The words "*ſpecial jurors*" are no warrant at all for raiſing a preſumption of a ſpecial jury in this caſe. If taken as a ſpecial jury, the annexing the panel of the jurors names to the *habeas corpora*, inſtead of inſerting them in the body of the writ, ſeems to be a defect in form only.

LORD HARDWICKE, *Chief Juſtice.* If the words "ſpecial jurors" do not amount to a ſpecial jury, then, indeed, the objection is improper here; but it ſhould be on motion for a new trial. The order of the Judge, &c. cannot appear on the record; but it is matter of regularity or irregularity only, and to be inquired into that way.

Adjourned, and on the laſt day of the Term the rule was diſcharged.

Caſe 251.

The King *againſt* Penelope Smith.

The return to a *habeas corpus* cannot be ſupplied by affidavits.

AN HABEAS CORPUS was iſſued to bring up the body of one *James Smith*, an infant between thirteen and fourteen years old, who was in the cuſtody of his aunt, and a general *paratum*

habea

habeo was returned, without ſpecifying any reaſon in the return for keeping him from his father; but that was ſupplied by *affidavits*, though of little or no conſequence.

Hardwicke, *Chief Juſtice*, objected to this practice as irregular, in ſupplying, by affidavits, what ought to have appeared on the return.

Mr. Bicknell then moved, on the behalf of the father, to have the child delivered over to him, as the perſon by law intitled to the care and cuſtody of him. In the caſe of *The King v. Johnſon* (*a*), upon a diſpute between the guardian of an infant of the age of nine years, appointed by the father's will, and a curator appointed by the ſpiritual court, the child being brought into court on the return to a *habeas corpus*, the Court took the child out of the hands of the curator, and delivered him over to the guardian (*b*).

On a *habeas corpus* to free the body of an infant from the cuſtody of his aunt, the Court will not determine the right of guardianſhip, but will merely ſet the child at liberty.

On the other ſide was cited *Sir Robert Viner's Caſe* (*c*).

S. C. 2. Stra. 982.
S. C. Cun. 72.

Lord Hardwicke, *Chief Juſtice*. There being no juſtification returned for detaining this child, he muſt certainly be left to his liberty as to his continuance with his aunt; but the queſtion is, Whether the Court ought to go farther, and deliver him over to his father? I think we cannot. The only intent of a *habeas corpus* is to provide againſt any reſtraint of the party's liberty. In the caſe in *Viner's Caſe* no more was done than to ſet the party at large. So in *Lady Catherine Anneſley's Caſe*, who being brought up by *habeas corpus*, the Court would make no order for delivering her over to the *Ducheſs of Buckingham*, her mother, though ſhe had the ſame right of guardianſhip to the child as here, the father in that caſe being dead. The caſe of *The King v. Johnſon* is the only caſe I have heard of to the contrary; and I do not ſee how that can be right. How can we, on motion, try the right of guardianſhip? for that would be the conſequence, which would diſable the party from taking the opinion of a ſuperior court by writ of error. I do not know but that the father may take the child wherever he finds him; however, he has his remedy againſt any perſon who detains him illegally. He may bring his writ of raviſhment of ward. There is an action too in which the guardianſhip itſelf is recoverable, the writ *de ejectione cuſtodiæ*. At this rate we are to do two acts upon this *habeas corpus*, not only to diſcharge him from the cuſtody of the firſt perſon, but likewiſe to commit him to the cuſtody of another. Where a perſon is removed into this court by *habeas corpus*, we commit him to the cuſtody of THE MARSHAL; but in caſe of removal from one priſon to another, there muſt be one *habeas corpus ad deliberand.* and another *ad recipiend.*

The other Judges concurred (*d*).

(*a*) 1. Stra. 579. S. C. 8. Mod. 214.

(*b*) See what is ſaid by Pemberton, *Chief Juſtice*, in the caſe of Lady Harriet Berkeley, 3. Co. 39. 3. State Trials,

(*c*) 2. Lev. 128.

(*d*) See Rex v. Mead, 1. Burr. 542. Rex v. Sir Francis Blake Delaval, 3. Burr. 1434.

The King againſt Penelope Smith.

Lee, *Juſtice*, ſaid, the caſe of *The King v. Johnſon* was ruled as cited at the Bar; but he ſaid, Lord Raymond, who was then one of the Judges, told him, that upon conſideration he thought the Court did wrong in that caſe.

Caſe 252.

Ruſſen *againſt* Coleby.

If *A.* covenant to pay ſeamen their wages *yearly*, and *B.* "in "conſideration "thereof," covenant to pay *A.* 42l. every month, theſe are *mutual covenants.*

1. Mod. 64.
2. Mod. 33.
2. Saund. 155.
1. Stra. 535.
Salk. 171.
Dougl. 665.659.
688.
4 Term Rep.
673 761.
1. H. Bl. Rep.
270.
1. Term Rep.
165.

ACTION OF COVENANT on articles of agreement, by which the plaintiff, who was maſter of a veſſel, covenanted to make uſe of the ſame in the coal-trade for the defendant's ſervice; and among other things covenanted, that, during the twelve calendar months (the time the veſſel was hired for) he would pay all the ſeamen their wages yearly; in conſideration whereof the defendant covenanted to pay the plaintiff forty-two pounds every month during the year: the non-payment of which is the breach aſſigned. To this the defendant pleaded, that the plaintiff did not pay the ſeamen according to his covenant; and to this plea there was a demurrer and joinder in demurrer.

Mr. Robinson *for the plaintiff* inſiſted, that theſe were mutual covenants; and that though the words are, "in conſideration "thereof," yet in the nature of the thing this could not be a *condition precedent*, for the payment of the ſeamen by the plaintiff is to be *yearly*; of the plaintiff by the defendant *monthly*; ſo that, from the manner of the covenants, it is impoſſible the performance of the act to be done by the plaintiff ſhould be neceſſary to intitle him to an action againſt the defendant for not doing the act he had covenanted to do; and he cited the caſe of *Thorp v. Thorp* (a), where this diſtinction is taken by Holt, *Chief Juſtice*, in the reſolution of that caſe.

Mr. Agar, *on the other ſide*, cited *Wyvil v. Stapleton* (b), where the plaintiff by deed covenanted to transfer to the defendant two hundred pounds *South-Sea* ſtock; and the defendant, in conſideration thereof, covenanted to pay therefor the ſum of thirteen hundred and ſixty pounds; the breach alledged was, the non-payment of this money; to this a trifling plea; and demurrer thereto: and the court of common pleas was of opinion, that the tender of this ſtock by the plaintiff to the defendant was neceſſary to intitle him to his action; and for want thereof, judgment was given for the defendant: upon a writ of error in the king's bench, that judgment was reverſed, becauſe that Court was of opinion, that they were mutual covenants, and no tender neceſſary; but the judgment in the king's bench was reverſed in the houſe of lords on this point.

Lord Hardwicke, *Chief Juſtice*. There can be no condition precedent here, for the reaſons given; and the reſolution in *Thorp v. Thorp* is certainly good law; for theſe caſes do not ſo much depend on the manner of penning the covenants as the nature of them. In the caſe of *Wyvil v. Stapleton*, the reaſon THE HOUSE

(a) 1. Salk. 171. (b) 1. Stra. 619. 3. Mod. 292. 3. Brown's P. C. 89.

OF LORDS went upon was, that it would be highly unreaſonable that the party ſhould be compelled to pay his money without having the ſtock, which was the conſideration for paying the money, transferred to him, or tendered; and that at leaſt the payment of the money, and transfer of the ſtock, ought to be concomitant acts.

The other Judges concurring,

Judgment was given for the plaintiff.

Robinſon *againſt* Beilby.

Caſe 253.

" *Nil debet*" cannot be pleaded to an action of debt on a charter-party.

S. C. Cun. 75. 2. Ld. Ray. 1503. Hard. 352. 3. Lev. 145. Co. Lit. 373. 1. Salk. 284.

WRIT OF ERROR on a judgment in the common pleas in debt on a charter-party, for the penalty therein-mentioned, and ſeveral breaches aſſigned. To this action *nil debet* was pleaded; which the common-pleas held an ill plea upon demurrer thereto, and gave judgment for the plaintiff.

MR. STRANGE, *for the plaintiff in error*, inſiſted, that this action not being grounded merely on the deed, but likewiſe on the breach of covenant, which is matter of fact, this plea was not improper (*a*).

MR. DENNISON *contra*. The caſes cited are, where debt is brought on a judgment ſuggeſting a *devaſtavit*; or in the caſe of an eſcape, there the record is matter of inducement only to the action, and not the ground of it, as here. This matter was very ſolemnly ſettled in the caſe of *Warren v. Conſett* (*b*): A writ of error was brought on a judgment in the common pleas in debt on a contract under hand and ſeal, whereby the defendant agreed to pay ſo much on having ſo many ſhares in the *Welch Copper Company* transferred to him; and *nil debet* was pleaded, and held ill upon the above cited diſtinction; and he compared it to an action of debt brought by the aſſignee on a bail-bond.

THE COURT were clearly of that opinion (*c*).

MR. STRANGE then excepted to the declaration, that one of the breaches was not ſufficiently ſet forth.

THE COURT inclined to be of that opinion.

In debt for a penalty, one breach well aſſigned is ſufficient.

MR. DENNISON ſaid, that any one breach well ſet out is ſufficient to intitle the plaintiff to an action for the penalty, and the aſſignment of the ſeveral breaches is duplicity of pleading only, and matter of form, of which no advantage can now be taken, the defendant having pleaded over; but he ought to have demurred.

THE COURT was of that opinion.

The judgment was affirmed.

(*a*) 6. Mod. 127. 1. Saund. 38. 21. *Hen.* 7. c. 14. ſ. 6.

(*b*) Eaſter Term, 1. *Geo.* 2. 8. Mod. 106. 323. 2. Stra. 778. 2. Ld. Ray. 1503. Prac. Reg. 306. 1. Bar. 15.

(*c*) See Mills *v.* Bond, Fort. 363. Mayhew *v.* Mayhew, Fort. 367. Anonymous, 2. Wilſ. 10.

Caſe 254.

Hallet *againſt* Lawton.

In treſpaſs *per quod ſervitium amiſit*, the plaintiff ſhall have *full coſts*, though the damages are under *forty ſhillings*.

THIS was AN ACTION OF TRESPASS for beating the plaintiff's ſervant, *per quod ſervitium amiſit*. The jury gave a verdict for the plaintiff, but for leſs than *forty ſhillings* damages.

A motion was made on behalf of the plaintiff that he might have full coſts, notwithſtanding the damages were under forty ſhillings.

3. Com. Dig. "Coſts" (A. 3.). Hullock on Coſts, 32 to 47.

And THE COURT held, that this was not to be conſidered as an action of aſſault and battery within the ſtatute 22. & 23. *Car.* 2. c. 9. but was founded on the *ſpecial damage* the plaintiff had received from the loſs of ſervice it had occaſioned, and therefore he ought to have full coſts; and the Court ſaid, that the caſe of *Brown v. Gibbons (a)* was directly in point with the preſent.

(a) Ante, 129. 1. Salk. 206. 2. Ld. Ray. 831. See alſo Carter v. Fiſh, 1. Stra. 645. Phillips v. Fiſh, 8. Mod. 371. Anderſon v. Buckton, 1. Stra. 192. Batchelor v. Biggs, 2. Black. Rep. 854. S. C. 3. Wilſ. 319.

MICHAELMAS TERM,

The Eleventh of George the Second,

AT

Serjeants Inn Hall.

BEFORE

The Twelve Judges,

EXCEPT

Denton, *Juſtice.*

Sir William Aſhburnham *againſt* George Bradſhaw and Others. Caſe 255.

ROBERT BRADSHAW, clerk, on the twentieth day of *November*, in the year 1734, duly made and executed his laſt will and teſtament; and by the ſaid will gave and deviſed divers lands and tenements to truſtees, and their heirs, in truſt for the benefit of certain *charitable uſes* therein mentioned, and ſeveral other truſts.

A deviſe of lands to charitable uſes made antecedent to the ſtatute of Mortmain is good, although the teſtator did not die until after the ſtatute commenced.

The ſtatute of the 9. *Geo.* 2. c. 36. entitled "An Act to reſtrain the diſpoſition of lands, whereby the ſame become unalienable," commenced from and after the twenty-fourth of *June* 1736. In *July* 1736 the teſtator died, without revoking or altering his ſaid will.

S. C. 2. Atk. 36.
S. C. Barn. C. 6.
S. C. cited 3. Atk. 552.
3. Atk. 551.
1. Vezey, 225. 186.
Amb. 451. 550.
2. Bl. Com. 273.

The queſtion was, Whether ſuch gift or deviſe, ſo far as the ſame relates to the charitable uſes aforeſaid, ſhould be good in law, notwithſtanding the ſaid ſtatute, or not?

This queſtion was referred, by the court of chancery, to the Twelve Judges for their opinion, and it was accordingly argued before them at *Serjeants Inn Hall.*

EYRES, *Serjeant*, *for the heir at law.* All wills are in their own nature revocable as long as the teſtator is living, and that not only by an expreſs revocation, but by an act which is inconſiſtent with it; therefore this act of parliament which has been made, being contrary to and inconſiſtent with the will, muſt amount to a revocation of it; nor is it a new caſe. If a tenant in tail make a will, and then ſuffer a common recovery, though done in order to give himſelf a power of diſpoſing, the will is at an end. If one make a will and afterward make a feoffment, though it be to the uſe of his laſt will, yet it is a revocation of it; and the preſent caſe is the ſame, for it being an act of parliament, the teſtator muſt be conſidered as a party to it, and it muſt be conſtrued his own act, as in 1. *Roll. Abr.* 616. (*K.*) *pl.* 2. If before 29. *Hen.* 8. *ceſtui que uſe* had deviſed the uſe, and the ſtatute had come after which transfers the uſe into poſſeſſion, this would have been a revocation, for thereby the uſe is gone; and every man is party to an act of parliament, and of conſequence the deviſor was ſo too. As to the particular words of this ſtatute they are, "that no "manor, lands, tenements, rents, advowſons, or other heredita- "ments, corporeal or incorporeal, whatſoever; nor any ſum "or ſums of money, &c. ſhall be given, granted, aliened, limited, "releaſed, transferred, aſſigned, or appointed, or any ways con- "veyed or ſettled to, or upon, any perſon or perſons, bodies po- "litic or corporate, or otherwiſe, for any eſtate or intereſt what- "ſoever, or any ways charged or incumbered by any perſon or "perſons whatſoever, in truſt, or for the benefit of any charitable "uſes whatſoever; unleſs ſuch gift, &c." Now when is it the lands ſhall be ſaid to be *ſettled and conveyed* by will? If at the time of the execution of it, then this is a caſe out of the ſtatute; if not until the death of the teſtator, then it is clearly within it. Now that a will operates and takes effect as ſuch at the death of the teſtator, is the conſtant doctrine of all the Books, and particularly in the caſe of *Butler v. Baker (a)*. And for this reaſon it is that a deviſe by the huſband to the wife is good, becauſe it does not take effect until his death; therefore there can be no difficulty to ſay when it is that a will ſhall be conſidered as a diſpoſition or ſettlement. And as to this caſe, had the Legiſlature intended to have excepted it, there would have been a clauſe to that purpoſe; but in fact there was no reaſon or occaſion to make ſuch a proviſion, for every perſon in *England* ought to be apprized of the law, and conform themſelves to it. This caſe has been compared to the caſe of *Serjeant v. Puntis (b)*, where a will was made before the ſtatute 29. *Car.* 2. c. 3. and the teſtator died after, and it was held not to be within the ſtatute. But that caſe is no way ſimilar to this, for it appears by the words of the ſtatute, that the Legiſlature had the time of execution ſolely in view, for all the circumſtances required by it relate to that time, *viz.* the ſigning, ſealing, and witneſſing. But on the other ſide there is a caſe which ſeems to be in point, *Buck v. Morgan*, 1717: A papiſt ſeiſed in fee, by will deviſed his eſtate from his heir at law to papiſts; afterwards a law paſſed which made all conveyances of ſuch perſons, unleſs for valuable

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(a) 3. Co. 25.

(b) Prec. in Chan. 77.

Sir William Ashburnham *againſt* George Bradshaw and Others.

conſideration, void, and after this the teſtator died; the heir at law, who had conformed, brought an ejectment; and the diſpoſition was held void unanimouſly by the court of exchequer in *Ireland*, and the judgment affirmed here in parliament. And among the reaſons in the printed caſe, which appears to be ſigned by Sir R. Powys and Sir R. Raymond, it is urged, that it could not be ſaid to be a diſpoſition until the teſtator's death; and in that caſe there was ſome colour to complain of hardſhip, on account of the conſtruction made, that the act related back to the firſt day of the ſeſſions, which is not contended for here. It muſt likewiſe be conſidered, that the title of this act is to prevent ſuch diſpoſition, and that it calls ſuch diſpoſition a miſchief; and if the Legiſlature call it ſo, I muſt do it likewiſe. And if the conſtruction contended for on the other ſide is to prevail, when is it that this act, made to prevent a miſchief, is to take place? There may be a thouſand wills extant which may have the ſame plea as this; beſides, not only all wills really executed before the act will come within the ſame reaſon, but how eaſy will it be to antedate a will made ſince the ſtatute.

Hollings. The law is clear that a will is no diſpoſition until the teſtator's death; it is of no force until then (*a*), ſo that he can exerciſe every act after, that he could before the making; it is in its own nature ſo. He cannot, by any words whatſoever, bar himſelf of the power he has of revoking it; it is not a complete diſpoſition, but only the inception of a diſpoſition (*b*); it cannot ſpeak until his death. It is for this reaſon that, in caſe of perſonal eſtate, whatever he has at the time of his death will paſs, though acquired after the making of the will; upon the ſame foundation a deviſe by jointenant is void. It is conſidered of ſo little account at the time of execution, that any alteration in the capacity of the party, between that and the time of his death, will deſtroy it; as if he ſell the lands deviſed and die before entry, or if he be convicted of felony (*c*). It differs indeed from the caſe of a *non compos*, becauſe the law conſtrues that to be his will which was ſo at the laſt time he had the free uſe of it. If *a feme ſole* make her will and then marry, it is a revocation. The act of parliament takes notice of it as a preſent grievance and likely to grow, and it would be abſurd to ſuppoſe a Legiſlature would apply a remedy to a preſent grievance, which remedy may not take effect until forty years after the making.

Fenwick. Nothing can be ſaid to be a diſpoſition or transfer, unleſs ſomething paſs out of one perſon and paſs to another; and the act ſaying "no diſpoſition ſhall be good," muſt mean that none ſhall take by it; and as any incapacity ſubſequent to a will renders it void, it is immaterial whether a deviſor become incapable

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(*a*) Swinburn, 12. Domat, 41. 284.

(*b*) 4 Co. 60. 2. Vern.

(*c*) Godolphin, 35. Year Book 39. *Hen.* 6. pl. 18.

Sir William Ashburnham *againſt* George Bradshaw and Others.

pable by his own act, by common law, or by ſtatute, as this caſe is.

Floyd *contra.* The queſtion is, Whether the will is an appointment from the making of it, or from the death of the teſtator only? A gift by laſt will differs from all other gifts; no particular form of words is required nor any conſideration; and is favoured much more than any other method of conveyance: now a gift, or at leaſt an appointment how a thing ſhall go, may be, though no one takes benefit of it immediately. The queſtion is not, When the deviſee ſhall take? for the words are not "no one ſhall take," but "no lands ſhall be given," and "all gifts which ſhall be made, &c." ſo that a gift, to take effect *in futuro*, is not out of the ſtatute. And though it is urged, that nothing can be ſaid a gift but where ſomething paſſes out of one perſon to another, yet ſurely we may abſtract the time of giving, from the time of taking by virtue of that gift. Upon what other foundation does the law ſpeak of *donatio cauſâ mortis*, which in *Chancery Reports*, 269. is defined to be, where one not having an opportunity to make his will, for fear he ſhould die before he has made it, gives away his goods with his own hands (*a*); this, if he die, ſhall operate as a legacy, but if he recover, then the property thereof reverts to him: now what reverts if nothing paſſed? In the *ſame Book*, 303. a will is put on the ſame footing with a *donatio cauſâ mortis*, for that both of them are gifts *in præſenti*, though to take effect *in futuro*, though not a preſent ſubſtantial gift, and though revocable during the parties life, and differ in nothing from one another. The words of the ſtatute of Wills, 32. *Hen.* 8. are, "give, diſpoſe, or deviſe," and are much the ſame as thoſe in this ſtatute. And ſurely, when a man has made his will, he has done every act that was neceſſary as to him to be done, in order to a diſpoſing or appointment: the death of the party is no act, it adds nothing to the diſpoſition itſelf, but only cloſes the period of time in which he had a power of altering it. The caſe of a real eſtate differs from that of a perſonal, for lands purchaſed after the making of the will will not paſs by it, which ſhews that it relates to, and operates from the time of the making, and that the teſtator's death is not the time to be regarded; for if ſo, he had thoſe lands then, and conſequently they would paſs. The ſtatute of Wills ſays, "ſhall continue in force." What ſhall continue in force? That which has no force until then. If one under his age of twenty-one years deviſe lands, and after come to that age, and die without republiſhing his will, it is totally void, becauſe void at the time of making, which is the material time to be conſidered. Though if one make a will, and afterward make a feoffment to the uſe of his laſt will, this is a countermand of his will, yet ſuch countermanded will is ſufficient to declare the uſes of the feoff-

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(*a*) 2. Vezey, 431. 3. Peer. Wms. 357.

ment even in mere legal conveyances, as a bargain and ſale; though no intereſt paſs until inrolment, yet after inrolment it veſts from the date of the deed. 4. *Rep. Hind's Caſe.* This caſe is likewiſe ſimilar to that of dower, where both marriage and death of the huſband are requiſite; and the marriage is but the inception of it, and no abſolute right veſts until the huſband's death; yet the time of the marriage is material: for if one marry a woman of the age of ſeven years only, yet if ſhe be nine years old at his death ſhe ſhall be endowed, notwithſtanding any meſne alienation; for though ſhe was not actually dowable at the time after marriage, yet ſhe was conditionally ſo. *Co. Lit.*

Pilsworth. It is very clear, that the act was not intended to relate to any will precedent to it, for there is an expreſs time mentioned when it ſhall begin to be in force, *viz.* the twenty-fourth of *June*, which would be quite nugatory to ſay none ſhall give after ſuch a day, if none could do it before that day; and therefore ſuppoſe a man had made a will after making the act and before the twenty-fourth of *June*, nay upon the twenty-fourth of *June*, certainly the act would not reach ſuch a caſe. It differs from the caſe cited upon the ſtatute of Uſes, for that act took away the uſe in the life of the party, and ſo deſtroyed the thing itſelf deviſed. Notwithſtanding a will takes no effect until the teſtator's death; yet in common underſtanding, a man may and often does ſay, when he has made his will, "I have given ſo much to ſuch a perſon, &c." or "I have ſettled my effects." And though a will be but a conditional gift, that is, though it contain many implied conditions, as that a deviſee live to take it, that he be of capacity to take, and that the deviſor does not revoke it, yet it is a gift. Was there anything neceſſary to be done, that was not done, in order to perfect it? Indeed ſome act was neceſſary in order to defeat it, but nothing to perfect it. In *Dyer*, 556. a deviſe was conſidered as an aſſignment; for though the deviſe take no effect until the party's death, yet when the deviſee is in, he is in by the aſſignment which the deviſor made in his life-time; and though it be certain that a gift by the huſband to his wife is void, whereas a deviſe to her is good, yet the reaſon uſually given, *viz.* that the deviſe takes no effect until his death, is exploded in 2. *And.* 17. for the wife, after the death of the huſband, is in by the huſband, which could not be unleſs by ſome act done in his life-time; and a deviſe, when it does take effect, takes its force as executed in the life-time of the party; and for that reaſon, even in the caſe of the king, it ſhall take place as prior to an eſcheat; or in the caſe of tenant in tail who has diſcontinued and taken back an eſtate in fee, a deviſe by him ſhall prevent a deſcent. Though a will ſpeak not until the death of the teſtator, yet the conſtruction of it is to be made as matters ſtood at the time of making, 2. *Vent.* 653.; therefore in the caſe of *Bunker v. Cook* (a) it was adjudged, that lands purchaſed after making the will would not paſs, though the words were, " I give " all my eſtate which I ſhall be poſſeſſed of at my death." But the preſent queſtion ſeems to be determined, as near as can be, in 2. *Chan. Rep.* 301. *Caxvill v.* , in a queſtion ariſing upon the 29. *Car.* 2. where the teſtator having made his will in 1675 before that ſtatute took place, which was the twenty-fourth of *June* 1679, the will was held to be a good will upon an iſſue directed, *deviſavit vel non*, though the teſtator died after the act, *viz. December* 1678. And the like point is ſaid by Lord Jefferies to have been reſolved *Skin.* 227.; and of the ſame opinion was the Master of the Rolls in *Chan. Prec.* 79. *Serjeant v. Puntis.*

(a) 11. Mod. 106 121.

Clarke. The exiſtence of a will and the operation of it are certainly different, and ought not to be confounded. It is a preſent ſettlement to take effect *in futuro*; and the very words of Holt, *Chief Juſtice*, in the caſe of *Bunker v. Cooke*, in *Fitzgibbon*, are, that it is a will and a diſpoſition at the time of the making, and the death of the party relates to that time, as an inrolment does to the time of executing a bargain and ſale, otherwiſe a will could never take effect; for if no will until the party's death, it could never prevent a deſcent, becauſe at that time the title of the heir accrues. There may be an immediate legal conveyance, though the beneficial intereſt is conditional and executory; as a contingent remainder is a remainder, though contingent; or if a bond be given for a ſum of money payable at a future day, it is due immediately, though payable *in futuro*. As to revocation of wills, acts of the party muſt be excepted; outlawry, marriage, &c. only make the will void immediately by taking away the ſubject matter and property, or immediately avoid it. 2. *Inſt.* 474. 272.

Comyns. Suppoſe a deed made before the ſtatute of *Will.* 3. of Stamps, with power of revocation during life, would that be void becauſe the party dies after? If one releaſe by will to another all his debts, this extends not to debts incurred after making the will: ſo if one deviſe a legacy to a pariſh where he lives, and he remove, it ſhall go to the pariſh where he lived when he made his will. A letter of attorney, though in its own nature revocable, is yet a ſufficient authority for doing any act under it till revoked.

Ten of the Judges, Parker, *Baron*, diſſenting, and Denton, *Juſtice*, being abſent, certified to the Lord Chancellor as follows: " We have heard Counſel on all ſides, and are of opinion, that the " gift of a deviſe, ſo far as the ſame relates to the charitable uſes " aforeſaid, is good in law, notwithſtanding the ſtatute 9. *Geo.* 2. " c. 36."

MICHAELMAS TERM,

The Twelfth of George the Second,

IN

The Common Pleas.

Sir John Willes, *Knt. Chief Juſtice.*
Sir Alexander Denton, *Knt.*
Sir John Forteſcue Aland, *Knt.*
Sir William Forteſcue, *Knt.*
} *Juſtices.*
Dudley Ryder, *Eſq. Attorney General.*
John Strange, *Eſq. Solicitor General.*

Morſe *againſt* James.

Caſe 256.

The ſtatute 8. *Hen.* 6. c. 12. does not extend to amend proceedings in inferior courts.

ACTION OF TRESPASS for driving away the plaintiff's cattle and impounding them, &c. The defendant juſtified, by virtue of an execution from an inferior court of record within the *Foreſt of Dean*, in the county of *Wilts*; and that being an officer of that court, by virtue of this execution to him directed, he levied the plaintiff's cattle, &c. to ſatisfy a judgment obtained againſt him in that court. To this plea of juſtification the plaintiff demurred, and the defendant joined in demurrer.

The cauſes ſhewn for demurrer were:

FIRST, That the writ was repugnant, in ſaying that the precept iſſued the twenty-fourth, and *teſted* the twenty-ſixth, two days after; and the queſtion was, Whether this was amendable?

THE COURT held, that the ſtatute 8. *Hen.* 6. c. 12. & 16. upon which writs are to be amended, does not relate to inferior courts; and therefore it is a void writ, and not amendable.

A juſtification under proceſs from an inferior court muſt give the court juriſdiction.

THE SECOND CAUSE ſhewn was, that it does not appear by the plea that the Court had any juriſdiction of the matter, and therefore their juriſdiction ſhould have been more particularly ſet forth; and as it is reſtrained not only to the perſons but to the ſubſtance

of

Morse *againſt* James.

of the action, and it being a court of record to try matters relating to mines and miners, it ſhould have ſhewn in the plea that the cauſe of action upon which this writ iſſued was for ſome matter relating to mines or miners.

The Court held, that it was abſolutely neceſſary to ſhew that the action related to mines or miners, for otherwiſe they have pleaded a preſcription, and not brought themſelves within it.

In what caſe a *writ* muſt be pleaded with a *prout patet, &c.*

The third cauſe was, that as this writ was returned, and pleaded as ſuch, it is a record; and being ſo, it ought to be pleaded with a *prout patet per recordum*.

The Court held, that this alſo was neceſſary; as they have ſet out the return, and thereby made it a matter of record, it was incumbent upon them to verify it with a *prout patet per recordum* (*a*).

A bad writ or warrant will juſtify the officer who executes it, if the court or magiſtrate had juriſdiction.

And lastly, Whether under this writ, and thus pleaded, the defendant's juſtification is good?

The Court held, that an officer might juſtify under a writ bad in matter of form; but if the writ be out of the juriſdiction of the Court, he cannot juſtify under it; as a conſtable may juſtify under a warrant of a juſtice of peace, be it ever ſo bad, for want of form; but if a juſtice of peace make out a warrant for any matter out of his juriſdiction, there the conſtable cannot juſtify, becauſe he was not obliged to obey, and he muſt take notice of it at his peril.

For theſe reaſons, judgment was given for the plaintiff (*b*).

(*a*) But this is only matter of form, Duncombe *v.* Church, 1. Salk. 1. Fanſhaw *v.* Morriſon, 2. Salk. 520, 521.

(*b*) Caſes cited for the plaintiff, Plowd. 491. 1. Salk. 408. 1 Inſt. 303. 2. Salk. 565. 3. Levin. 29. 1. Levin. 211. 1. Lutw. 26. 2. Lutw 915. For the defendant, 1. Vent. 662. 2. Keb. 173. 198. 3. Keb. 213. Cro. Jac. 61. 161. 561. 1. Levin. 173. Sir T. Jones, 41. 2. Salk. 700. 5. Co. 90. 1. Salk. 1. Levin. Entr. 179. 182. 206. Thomſ. Entr. 333. pl. 56. 331. 312, 313. pl. 52.

Caſe 257. Shipman *againſt* Thomſon.

An executor may ſue in his own name for monies received ſubſequent to the teſtator's death, and the defendant cannot ſet off a debt due to him from the teſtator.

Assumpsit for money had and received to the plaintiff's uſe. The defendant pleaded *non aſſumpſit*, and ſet off againſt the plaintiff's debt.

A case was made at the aſſizes for the opinion of the Court: The plaintiff's huſband made her executrix; the defendant, after the teſtator's death, received ſeveral ſums of money for rent due to the teſtator in his life-time, for which this action was brought; and the defendant would have ſet off ſeveral ſums of money due from the teſtator to the defendant againſt the plaintiff's debt.

made upon this caſe were, Whether the plaintiff ed as executrix to her huſband ? and then, if ſhe Whether the defendant could not have ſet debt owing him by the teſtator in his life-

SHIPMAN *againſt* THOMSON.

. This debt, when recovered, will be aſſets lia- ator's debts; and if the defendant could be allowed is debt, he may pay himſelf before the bond-creditors , and by that means ſimple contracts would be paid before of a ſuperior nature. We think the action is very properly ought; for when money is due to the teſtator himſelf, but received after his death, the executor may ſue in his own right; but if the cauſe of action aroſe in the life-time of the teſtator, there he muſt ſue as executor. Therefore we are of opinion, that the *poſtea* muſt be delivered to the plaintiff.

Cockerill *againſt* Armſtrong. Caſe 258.

In treſpaſs, if the defendant juſtify as ſervant to *commoners* for *damage feaſant* on the common, a replication of *de injuriâ ſuâ propriâ* generally, is not good.

TRESPASS for taking away and impounding the plaintiff's horſe. The defendant juſtified as ſervant to the bailiffs and burgeſſes of *Scarborough*, who were ſeiſed in fee of a certain common, and that he took this horſe *damage feaſant* upon the common as their ſervant, &c. To this plea the plaintiff replied generally, *de injuriâ ſuâ propriâ abſque tali cauſâ.*

The defendant demurred ſpecially, becauſe the plaintiff, by his replication, has traverſed ſeveral matters; and that no iſſue could be taken thereupon.

S. C. Comy. Rep. 582. Cro. Eliz. 359. 1. Lev. 307. 2. Show. 310. 1. Ld. Ray. 640. 2. Ld. Ray. 1483.

AND TO THIS the caſes cited were, 8. *Rep.* 66. *Thom. Entr.* 296. 307. 361. 364. *Yelv.* 153. *Brownl.* 215. that where no title can come in queſtion, and it is only matter of excuſe, there *de injuriâ ſuâ propriâ, &c.* may be good.

ON THE OTHER SIDE, *for the plaintiff*, the caſes cited were, *Cro. Car.* 138. 3. *Mod.* 137. 1. *Roll. Rep.* 333. *Cro. Jac.* 224. *Salk.* 643. 2. *Saund.* 295. *Salk.* 107. where poſſeſſion is ſufficient in tranſitory actions. *Salk.* 628. *Yelv.* 75. *Moor*, 146. 2. *Mod.* 70. *Lutw.* 1492. *Salk.* 643.

THE COURT. The queſtion is, Whether that plea has not more than mere matter of inducement neceſſary for the plaintiff to anſwer in his replication ? As the defendant has thought fit to lay a ſeiſin, it was neceſſary for him to prove it, and therefore he ought to have had an anſwer from the plaintiff. We think, that *de injuriâ ſuâ propriâ* generally is not a good replication; for here are ſeveral things put in iſſue, whereas all iſſues ought to be ſingle. It was not neceſſary to ſet out the ſeiſin in fee, poſſeſſion would be ſufficient; but as they have done it, it will be incumbent on them to prove it.

Judgment was given for the defendant (*a*).

(*a*) See Crogate's Caſe, 8. Co. 67.

Drinkwater

Caſe 259. Drinkwater *againſt* Quenell.

If *A.* incloſe money in a parcel of goods belonging to *B.* and *B.* ſend the parcel to *C.* a common carrier, and the parcel is loſt, *A.* may maintain an action againſt *C.* for the money, although he did not tell the carrier that money was contained in the parcel, and although he only received the rate of carriage for goods.

ACTION againſt the defendant, as a common carrier, for loſing a parcel of goods, in which two hundred pounds were incloſed which belonged to the plaintiff, but the goods to one *Gears*.

THE JURY find, that the carrier, when he carried money for any one, charged five ſhillings for every hundred pounds; and if it was leſs, two-pence in the pound; that upon a converſation ſome time before the action was brought between the defendant and *Gears*, the defendant told *Gears* he never would carry any more money for him unleſs he gave him notice of it; upon which *Gears* ſaid, if he did not like it he ſhould ſend it back again: that it was ſent to the carrier by a ſervant of *Gears*'s, who, when he delivered it, bid the carrier take care of it, for it was a parcel of ſilk: upon this the carrier took it, and charged *Gears* for the carriage one ſhilling and threepence.

Upon this caſe two queſtions aroſe:

S. C. Bull. N. P. 75.

FIRST, Whether an implied *aſſumpſit* aroſe to the plaintiff, there being no agreement between the plaintiff and defendant, only as it was his money ſent by *Gears* among his goods, in whoſe name the defendant inſiſted the action ought to be brought?

SECONDLY, Whether the carrier, under the circumſtances of this caſe, ſhall make good the loſs of this money to the plaintiff?

FOR THE DEFENDANT *it was ſaid*, that he had received no reward for carrying the money, and that the plaintiff had uſed this fraud in order to deprive him of his juſt demand for it: that the defendant was obliged to carry it, otherwiſe he would have been liable to an action at the ſuit of *Gears*, for his refuſal ſo to do (*a*); that the defendant upon that converſation had cautioned *Gears* from ſending money without notice, and therefore had no occaſion to repeat it again; that though the ſervant was guilty of the fraud, yet his maſter is anſwerable for it in this caſe; and that the carrier had only one ſhilling and threepence, whereas he ought to have had eleven ſhillings and threepence.

The caſes cited were, *Cro. Jac.* 331. 366. 1. *Sid.* 36. *Carth.* 331. *Hawk. P. C.* 90. 3. *Lev.* 37. *Allen*, 29. 1 *Roll. Abr.* 32.

ON THE OTHER SIDE *it was ſaid*, that the carrier was liable, unleſs he made a *ſpecial acceptance*; and that one is not obliged to tell a carrier what is contained in a parcel.

The caſes cited were, *Salk.* 143. *Hob.* 17. 2. *Saund.* 379. *Kelyng.* 39. 1. *Dan. Abr.* 15. *Moor*, 462. 1. *Vent.* 190. *or*

(*a*) Moor, 574. Skin. 238. 2. Show. 187.

(*b*) Cro. Jac. 471. Salk. 441.

208. *Salk.* 388. *Allen*, 93. *Moor*, 158. *Dyer*, 266. *Cro. Jac.* 371.

After a conſultation with the Judges, Willes, *Chief Juſtice*, gave the judgment of the Court. A carrier is liable for every thing he takes, unleſs he accepts it ſpecially. The caſe in *Allen*, 93. is in point, and ſo is that 1. *Vent.* 190. 238. *Morſe v.* . The defendant would have this to be a very great hardſhip upon him; but I think it none, becauſe it is in his own power to ſave himſelf by a ſpecial acceptance. And as to the fraud in this caſe, we are all of opinion, that a man is not obliged to let a carrier know what is in a parcel, and therefore he may diſguiſe it; for he may accept it ſpecially; and that might be an encouragement for robberies rather than an hindrance.

We likewise think the action is properly brought; for though there was no contract proved between the plaintiff and defendant, yet there is an implied one, which, with the plaintiff's having a property in his money, has entitled him to his action; for as the carrier might have detained the goods until the carriage was paid for, ſo muſt he ſtand to the loſs of them if they meet with any accident.

It is alſo found, that upon the converſation between the defendant and *Gears*, *Gears* ſaid, if he did not like them he might ſend them back again; ſo that by the defendant's accepting them, if any advantage might otherwiſe have been taken (but we think there could be none), by that acceptance he has waived it.

For theſe reaſons we are of opinion, that *the poſtea* muſt be delivered to the plaintiff (*a*).

(*a*) But ſee Titchburne *v.* White, 485. Gibbon *v.* Paynton, 4. Burr. 2298. 1. Stra. 145. Tyler *v*, Morris, Carth. Clay *v.* Wilſon, 1. H. Bl. Rep. 298.

Davis *againſt* Powell.

Caſe 260.

Deer may be diſtrained for rent.

TRESPASS for diſtraining the plaintiff's deer. The defendant juſtified as ſervant to *Lord Cadogan*, who had leaſed to the plaintiff thirty acres of land, upon which he (the plaintiff) was to keep one hundred deer, and to have liberty to ſell them at the expiration of the term; but the plaintiff being in arrear to *my Lord* for rent, the defendant diſtrained the deer.

The queſtion was, Whether deer are diſtrainable or not?

It was ſaid by the plaintiff's Counſel, that deer being *feræ naturæ* are not diſtrainable (*a*).

(*a*) Finch, 126. Co. Lit. 47. 1. Roll. Abr. 666. 3. Lev. 227. 7. Co. 17. 3. Inſt. 109. Hawk. P. C. 124.

Davis *againſt* **Powell.**

It was alledged *for the defendant*, that the nature of things changes, and with them the reaſon of the law; and though formerly deer being conſidered *feræ naturæ* could not be diſtrained, being then kept for pleaſure, yet they are now chiefly kept for profit; and therefore that reaſon fails now.

And judgment was given for the defendant.

Caſe 261. Bayley and Others *againſt* Lloyd and Others.

A releaſe from one truſtee after action brought may be pleaded in bar.

Debt on bond by the plaintiffs, as truſtees, &c. to which the defendants pleaded *a releaſe* from one of the truſtees after the action brought. To this there was a demurrer and joinder.

And the queſtion was, As this was not in the plaintiff's own right, but as it was in the right of a company, and it being a common releaſe, whether it could bind the other plaintiffs, parties (a)?

The Court. The obligees have the only legal intereſt in them, and conſequently the only right to releaſe; and a releaſe from the one being a releaſe from the other, it is certainly well pleaded. The caſe of the *Counteſs Kent* was cited.

Judgment for the defendants.

(a) 1. Lev. 272. Cro. Eliz. 6. 2. Roll. Abr. 409. 2. Lev. 214. 3. Lev. 273. Moor, 832. 1. Leon. 263.

Caſe 262. King *againſt* King.

Original writ not amendable, unleſs in a mere miſpriſion.

8. Co. 159.
2. Roll. Abr. 198.
1. Lev. 2.
2. Vent. 46. 49.
Ld. Ray. 1057.

Motion to amend an original and declaration. The action was brought by the plaintiff as adminiſtrator, whereas he and another were executors.

And the queſtion was, Whether this could be amended?

For the amendment the caſes cited were, *Cro. Car.* 74. 3. *Lev.* 147. 2. *Vent.* 173. *Co. Reports, Blackmore's Caſe.*

On the other side it was inſiſted, here was nothing to amend by.

Willes, *Chief Juſtice.* The motion is to amend the declaration and original; but in fact it is but one amendment; for if we grant the amendment in the original, the declaration may be amended of courſe; ſo that the queſtion will be, Whether we can amend the original? And as to that there are two rules by which we are to be governed: the one is, that no amendments in original writs can be made, unleſs it be the miſpriſion of the clerk; the other, that nothing can be amended unleſs there is ſomething to do it by. In the preſent caſe it is not ſo much as pretended that there is any miſpriſion in the clerk or officer, nor is there any proceeding in the court to amend by. The adminiſtration is the act of another court, in which we have nothing to do. Since the ſtatute has laid down theſe rules, whereby we are to be led, the preſent caſe not coming within either of them, I think we cannot amend it.

DENTON, *Juſtice.* The amendment now deſired is, to ſet forth a new title, which I think is ſo far from being the meaning of the ſtatute, that it is quite the contrary. If the plaintiff has miſtaken the title, we cannot help that. An original writ has often been determined not to be amendable. I think we have no power to grant the amendment.

FORTESCUE ALAND, *Juſtice.* I do not know how we can amend an original. *Gage's Caſe* is miſreported (*a*), for the Court there held, that it could not be done. A bill in the king's bench is in nature of an original, and an amendment in the date of it (*b*) has been refuſed. A writ of error is an original, and was refuſed to be amended till allowed by act of parliament (*c*). I think it cannot be amended.

WILLIAM FORTESCUE, *Juſtice.* It is undoubtedly true, that original writs are not amendable by common law, becauſe they iſſue out of another court over which we have no juriſdiction, and therefore have no authority over their proceedings; and all the power we have to amend is given us by the ſtatute. I think, we ought to carry the intent of an act of parliament as far as it is in our power; but ſurely we cannot carry the meaning of this act (which only helps the miſtake of a clerk) ſo far as the amendment now deſired, becauſe that is matter of ſubſtance; nor is here anything upon record in our Court to amend it by: Therefore I am againſt the amendment.

(*a*) 5. Co. 45. (*b*) 3. Cro. 286. 482. (*c*) 1. Salk. 52.

Eaton *againſt* Southby.

Caſe 263.

A diſtreſs cannot be made upon a tenant at will after the tenancy is determined; nor can a diſtreſs be made of goods taken in execution (*a*).

S. C. 2. Barnes, 166.

REPLEVIN for taking and retaining ſeventy ſhocks of wheat. The defendant avows the taking, for that he was *ſeiſed in fee* of a meſſuage and one hundred acres of land, and demiſed to one *Dunſby*, his executors, adminiſtrators, and aſſigns, to hold for one year, rendering rent, to be paid quarterly, by virue whereof he entered and was poſſeſſed; and becauſe at the time when, &c. thirty-one pounds five ſhillings for one quarter's rent were in arrear, he diſtrained the wheat, being upon the ground there.

The plaintiff, in bar to the avowry, PROTESTING againſt the eſtate and demiſe, pleaded, that one *Henry Laſher* recovered a judgment againſt one *George Saunders*, and took out execution upon it; after which *Saunders* died; and that there having been ſeven acres ſown with wheat by the ſaid *Saunders* in his life-time, who, at the ſaid time of ſowing, having been poſſeſſed thereof as tenant at will to the defendant, the ſheriff took in execution, by virtue of the ſaid writ of *fieri facias*, the ſaid wheat, and afterwards, and before the taking, ſold it to the plaintiff; and that the plaintiff, being ſo poſſeſſed of the ſaid wheat, permitted it to grow till, in a courſe of huſbandry,

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(*a*) See 8. *Ann.* c. 14. ſ. 6. and 11. *Geo.* 2. c. 19. ſ. 14.

it was fit to be cut, and afterwards cut it, and made it into ſhocks, and let it lie until, in a courſe of huſbandry, it was fit to be carried away; and the ſaid defendant of his own wrong, after this, and before it was fitting to be carried away, took and detained, under a pretence of a diſtreſs, the ſaid ſhocks of wheat (*a*); and that at the time of the diſtreſs there were other goods and chattels on the premiſes ſufficient to anſwer the value of the ſaid rent; and then avers, that the ſhocks ſo ſold to and cut by him are the ſame as mentioned in the declaration and avowry; and therefore prays judgment and his damages. To this there was a general demurrer and joinder, &c.

THE QUESTION in this caſe was, Whether the plea in bar be good or not?

IT WAS OBJECTED *by the defendant's Counſel*, that it is not ſufficiently averred that *Saunders* was tenant at will to the defendant. It ſays, "that he at the time of ſowing the corn having been poſſeſ-" "ſed as tenant at will, &c." which relates to a time paſt, and is not an averment that he was ſo at the time of the ſowing; and the plaintiff ought to ſhew a lawful poſſeſſion in *Saunders*, in order to entitle himſelf to the corn, for replevin is a real action (*b*): and as this is *matter of ſubſtance*, it is not neceſſary to be ſhewn for cauſe of demurrer. The commencement of the eſtate at will ought to have been particularly ſhewn (*c*). The execution was *teſted* the laſt return of *Hilary Term*, and on the twenty-ſecond of *March* delivered to the ſheriff; after which, and before the ſheriff ſeized, *Saunders* died; and that upon his death the ſheriff's power was determined. Where the ſheriff makes a ſeizure before the death of the defendant, he may ſell it afterwards; but whether he can ſeize after the death of the defendant, though the execution was delivered to him before, muſt be ſubmitted: and if the ſheriff could not ſeize the corn, they muſt fail in the juſtification. But ſuppoſing it be otherwiſe, the landlord's rent muſt iſſue out of the land, and the profits of it are the ſecurity for the landlord; and they are in the cuſtody of the law no longer than they are in the ſheriff's poſſeſſion; and when the ſheriff makes his bill of ſale, the bargainee muſt take care of them at his peril (*d*). I am aware of its being objected, that this was not the ſhock of the tenant from whom the rent was due, for that, it ſeems, was due from another tenant ſince his death. The land is the landlord's debtor; if ſo, he is not to enquire to whom the corn belongs. When a landlord ſeizes cattle *levant et couchant*, it may be ſaid that theſe are not the cattle of the tenant. What if they are not? There he finds them eating the profits of his land which is charged with the rent; it is nothing

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(*a*) But ſee the ſtatutes 2. *Will.* 3. c. 5. and 11. *Geo.* 2. c. 19. ſ. 8.

(*b*) Finch, 316. Booth on Real Actions, 2. F. N. B. 201. Carth. 9. 1. Lutw. 1490. Co. Lit. 303. Cro. Car. 571.

(*c*) 2. Lutw. 1313. 3. Lev. 220. Yelv. 147.

(*d*) 3. Lev. 260. 2. Vent. 50. 2. Saund. 289.

to him whoſe they are; and here is corn found upon our ground; it is nothing to us whoſe it is *(a)*.

It was said *for the plaintiff*, that they were not making out a title; that they admitted it to be in the defendant; for it is ſaid, that he was poſſeſſed as tenant at will to the defendant; but no diſtreſs can be taken of tenant at will after the determination of the will; for by the ſtatute of the 8. *Anne* it is required, that the poſſeſſion of the tenant does continue; and here the will is determined by the act of God; and this diſtreſs is not for the rent of the tenant at will, but of another tenant; and it is averred in the plea in bar, that there were other goods and chattels on the premiſes out of which he might have had full ſatisfaction for the rent; and if the landlord determine the will, if his corn be ſown, he or his repreſentatives ſhall have free ingreſs, egreſs, and regreſs, to enter into the premiſes, and take and carry away the corn *(b)*: that he had a right to keep the corn there, for being diſtrainable it was *in cuſtodiâ legis*, until it was fit to be carried away; and nothing is diſtrainable in a place where the owner has a right to put it *(c)*.

After ſeveral arguments,

Willes, *Chief Juſtice*, gave judgment. The queſtion in this caſe is, Whether the plea in bar be good or not? And as to the objections taken to *the form* of it, that it is not ſufficiently averred that *Saunders* was tenant at will at the time of ſowing the corn, and that the particular commencement of the eſtate ought to have been ſhewn, we think there is no weight in them; for it is a rule, that pleas ſhall be conſtrued according to a *common intent*. There was a diſtinction taken, that replevins might either be real or perſonal actions, according to the manner of pleading them. When the title of the land was brought in queſtion upon the pleadings, then it was a real action; but when not, then a perſonal one; and to warrant it cites *Finch's Law*, 316. where it is laid down ſo: but we think it is a diſtinction without any manner of foundation, for an action is not real or perſonal according to the manner of pleading it, but for that which is recoverable by it; and in replevin a man cannot recover anything that is real. Was that diſtinction to hold, actions of treſpaſs, nay even actions of debt, may become real actions. But I think a replevin cannot be a real action in any caſe whatſoever.

As to the objection of the ſheriff's having no power to ſeize the corn, becauſe *Saunders* the tenant at will died before it was levied, we think there is nothing in that neither, for the goods are bound from the time of the delivery of the writ to the ſheriff.

(a) 1. Salk. 368. Latch, 8.

(b) Co. Lit. 47. 56. Dalt. Sheriff, 556. 1. Vent. 222. Bro. Abr. 257. pl. 74. Yelv. 74. Cro. Car. 138. 2. Mod. 70. 3. Mod. 132. Salk. 460.

(c) 2. Vern. 129. Cro. Eliz. 549. 596. and Read *v.* Barnes, Cro. Eliz.

Goods taken in *execution* cannot be *diſtrained.*

1. Vent. 221.
Comy. Rep. 203.
1. Atk. 102.
Dougl. 411.
Gilb. Diſt. 51.

But the principal objection, and which was moſt relied upon, was the laſt, and that was this, Whether the goods once taken in execution could be diſtrained or not?—AND WE ARE ALL OF OPINION, that they cannot, becauſe they were in the cuſtody of the law. *Co. Lit.* 47. *a.* And we think, that had there been no execution at all in this caſe, that the corn could not be diſtrained, for this is a diſtreſs upon a tenant at will, or his repreſentatives, which is the ſame thing, after the will is determined, not by himſelf, but by the act of God. And if we ſhould think this diſtreſs lawful, we ſhould overturn all that known and undoubted law laid down in *Litt. ſect.* 68. that the man that ſows ſhall reap. It was rightly ſaid upon the argument, that the landlord could not let the land in any other condition than he had it, which was ſubject to the privilege of the tenant's having free ingreſs, egreſs, and regreſs, to take away the corn as ſown.

We are, therefore, clearly of opinion, that judgment muſt be given for the plaintiff.

Caſe 264.

Pitts *againſt* Evans.

A clerk of a pariſh is a temporal officer, and muſt ſue for his dues in the temporal courts, and not in the ſpiritual.

S. C. 1. Barnes, 305.
S. C. Pract. Reg. 356.
S. C. 2. Stra. 1108.
2. Roll. Abr. 234.
Cro. Car. 589.
1. Bl. Com. 395.

ON MOTION to ſhew cauſe why a prohibition ſhould not go to the conſiſtory-court of the *Biſhop of London* to ſtay the proceedings in a ſuit commenced there by a pariſh-clerk for his dues, according to a rate agreed to by the pariſh;

IT WAS ARGUED BY THE COUNSEL *againſt the prohibition*, that the office of a clerk was a ſpiritual office, and that his ſalary for ſerving that office muſt neceſſarily be of eccleſiaſtical cognizance; that he is to be choſen by the parſon; and that in ſome churches they read the firſt leſſon. 2. *Roll. Abr.* 300. 307. *Salk.* 332. *Keyl.* 100. *Fitzg.* 189.

ON THE OTHER SIDE *it was ſaid*, that the office of a clerk was merely temporal (*a*), and that all he had to do was, to wait upon the parſon, put on his ſurplice, ſay "amen" when he was out of breath, and perhaps ſet a pſalm when the parſon cannot ſing; that a curate cannot ſue in the eccleſiaſtical court for his penſion; and that an *aſſumpſit* will lie for it is expreſsly laid down in the caſe of *Burth v. Wood*, *Salk.* 506. It is no matter by whom he is to be choſen, for that cannot make the office the more ſpiritual or temporal. 2. *Roll. Abr.* 234. 283. 286. 2. *Cro.* 670. 13. *Co.* 70. 1. *Keb.* 286. *March*, 101. 6. *Mod.* 252. *Parker v. Clark*, 2. *Salk.* 536.—This fee is due, they ſay, by cuſtom; if ſo, an *indebitatus* will lie for it, for all cuſtoms imply a promiſe to perform it. Proctors fees are to be ſued for at common law. *Salk.* 533. *Jefford's Caſe.*

(*a*) Peake *v.* Bourne, 2. Stra. 942. Tarrant *v.* Heyly, 1. Burr. 367. Rex *v.* Warren, Cowp. 370.

WILLES, *Chief Juſtice.* The power of granting prohibitions is not, as has been ſaid, a diſcretionary power in the Court. Can we in one caſe grant a prohibition, and in another (though attended with the ſame circumſtances) deny it? No; we are *ex debito juſtitiæ* bound to do it. If a ſuit be brought for the ſame matter into two courts where there is a concurring power, the Court in which it was firſt commenced has the cognizance of it. *Hob.* 66. 1. *Salk.* 63. What eſtate the clerk has is out of the queſtion; and ſo is the right of electing him. There are two points to be conſidered: Whether the office of a clerk be ſpiritual or temporal? and ſuppoſing it to be ſpiritual, Whether he can ſue for his fees in the eccleſiaſtical court? And for my part, I do not look upon the pariſh-clerk to be any order at all; I know of none but biſhops, clerks, and deacons: but I do not conſider him as an aſſiſtant to the parſon, nor look upon him as the parſon's footman, as was ſaid, but I take him to be an aſſiſtant to the pariſh: and I do not doubt but thoſe books which ſay he is a temporal officer are good law; and being a temporal officer, the ſalary, or whatever is to be given for the ſervice of the office, muſt of conſequence be of temporal cognizance: that being ſo, I think the eccleſiaſtical court has no juriſdiction; and therefore a prohibition ought to go.

DENTON, *Juſtice*, was of the ſame opinion.

FORTESCUE ALAND, *Juſtice.* If we think the eccleſiaſtical court has no cognizance, we are *ex debito juſtitiæ* bound to grant a prohibition. 2. *Vent.* 34. That a pariſh-clerk is a temporal officer has often been determined. 2. *Brownl.* 38. I think the clerk has an eſtate for life; though in the caſe 2. *Cro.* 670. two Judges were of opinion, that he had a freehold eſtate, and not an eſtate at will, for that the parſon cannot turn him out. But whether he is a ſpiritual or temporal officer, he cannot ſue in the eccleſiaſtical court for his fees; for, How are they due? Why, by a rate agreed to by the pariſh; and ſurely he may bring his action upon the agreement: and as for proctors fees, it is moſt certain they cannot be recovered in the ſpiritual court, becauſe it is in itſelf a temporary fee, and not ſettled by any canon. 1. *Salk* 330. And I am the more ready to grant a prohibition, becauſe no writ of error lies there.

The office of pariſh-clerk is an office for life, and he cannot be removed at the pleaſure of the *parſon.*

1. Black. Com. 395.

WILLIAM FORTESCUE, *Juſtice.* The only queſtion, I take it, is, Whether the matter ſued for be of eccleſiaſtical cognizance or not? For if it be an eccleſiaſtical matter, it does not avail what the perſon is, and he may ſue for it in that court; and ſo *è contra.* If the perſon ſuing be an eccleſiaſtical man, and the matter temporal, I think a prohibition ought to go.

And it was accordingly granted.

Caſe 265. The Univerſity of Cambridge *againſt* Lamb and Gibſon.

If a *quare impedit* be brought by a perſon as *executor* who is not ſo, the Court will not, on his taking out *adminiſtration*, allow the record to be amended after *ſix months* have expired from the time the writ iſſued.

THE Univerſity claimed the preſentation to the church of *G.* in the dioceſe of *Carliſle*, in the province of *York*. A *quare impedit* was brought by one *King*, as executor of *John King*; and afterwards finding that he was not executor, he took out a joint adminiſtration with his ſiſter under the archbiſhop of *Canterbury*; and then moved to have the record amended, ſix months being paſſed ſince the writ was brought.

Bootle, *Serjeant*, for the amendment, cited, 3. *Cro.* 119. 1. *Cro.* 74. 3. *Lev.* 347. *Fitzgib.* 193. 4. *Lev.* 12. and many others on both ſides. 1. *Danv.* 346. *Sid.* 412. 2. *Vent.* 152. *Hob.* 118. *Noy*, 64. 2. *Cro.* 587. 8. *Co.* 159. & 163. 5. *Co.* 45. *Styles*, 115. *Litt. Rep.* 50. *Hob.* 29. 1. *Vent.* 154. *Salk.* 301.

An objection too was made, that adminiſtration was taken under the archbiſhop of *Canterbury*, whereas the church lay in the province of *York*; and as ſeveral adminiſtrations muſt be taken out where goods lie in ſeveral provinces, as 2. *Lev.* 86. *Hard.* 216. ſo muſt it be in the caſe of an advowſon. This point was not determined.

But to the amendment, Willes, *Chief Juſtice*, ſaid, that at common law no original was amendable in caſe of a common perſon; that the ſtatute of 14. *Edw.* 3. c. 6. extended only to judicial writs, "proceſs" being the word uſed in the ſtatute, which does not comprehend original writs; that the firſt ſtatute that gave amendment in a *quare impedit* to a common perſon was 8. *Hen.* 6. 12.; and as our power of amendment is derived entirely from that ſtatute, and as it extends only to miſpriſions of the clerk, and does not diſtinguiſh this caſe, no more can we. All the authorities cited were amendments merely of the miſpriſion of clerks, and the difference in all of them is made between matters of ſubſtance and palpable neglects; that the inconvenience only influences the Court where their power is diſcretionary, not where it is limited by ſtatute; and that amendments are now brought to be tried by two rules: firſt, The inſufficiency muſt proceed from the miſpriſion of the clerk; ſecondly, there muſt be ſomething in the record to amend by. As to the firſt: In the caſe at bar, there is no miſpriſion or *neſciens* of the clerk pretended, but the original is founded on a wrong title; and as it iſſues out of chancery it cannot be amended here, unleſs it come within the ſtatute. And he diſapproved of the diſtinction taken in 8. *Co.* between the ignorance and negligence of the clerk as too nice. Secondly, There muſt be ſomething to amend by, as in *Cro. Jac.* 587. 5. *Co. Page's Caſe.* 3. *Cro.* 286. 462. A bill is not amendable by a declaration, but a declaration is amendable by a bill. No writ of covenant can be amended, either by common or ſtatute law, as *Salk.* 52.

But here the adminiſtration is not ſufficient to amend by, and there is nothing elſe alledged; and therefore

Per Curiam, No amendment can be in this caſe, ſince there are no proceedings in this court by which it may be amended.

The University of Cambridge *againſt* Lamb and Gibson.

Pain *againſt* Womanſell.

Caſe 266.

An action lies, at the ſuit of *a landlord* againſt *the ſheriff*, for neglecting to pay him a year's rent on an execution on the goods of his tenant; and the declaration in ſuch action need not recite *the ſtatute* of 8. *Anne*, c. 14. nor *the judgment* on which the execution was founded.

AN ACTION OF DEBT was brought againſt the ſheriff for not paying a year's rent to the plaintiff, out of the monies levied on the goods of his tenant, taken in execution; according to the ſtatute 8. *Anne*, c. 14.

After a verdict given, this Court was moved in arreſt of judgment;

First, That the action did not lie againſt *the ſheriff*, but againſt *the plaintiff* in execution.

Secondly, That the declaration was defective, for it ought to be *qui tam*, &c. as in the caſe of *Lady Waterhouſe v. Bawd* (a).

Thirdly, That the ſtatute 8. *Anne*, c. 14. ſhould be ſet forth particularly.

Fourthly, The judgment on which the execution was founded ſhould be mentioned in the declaration, as 1. *Saund.* 37. *Jones v. Pope*. 1. *Lev.* 191.

1. Stra. 97.
B. R. H. 255.

The Court. The action well lies againſt the ſheriff; for the ſtatute ſays expreſsly, "he ſhall levy the debt on the goods taken "in execution;" and by the execution the goods are the ſheriff's, and conſequently liable to the debts to be paid out of ſuch goods. As this is by a ſtatute, if that were not purſued the whole would be illegally executed.

To the second objection, It is true, that where a ſtatute prohibits a thing, and no penalty, where the king is to have a fine the declaration ſhould be *qui tam*. So for ſuing in the ſpiritual court for matters temporal is a contempt to the crown.

Skinner, *Serjeant*, from the Bar, ſaid, that where an action is given by a ſtatute to a party grieved, or to any certain perſon, it may be brought in his own name, except a fine be due to the king; but if the action be incertainly given, it may be otherwiſe.

To the third objection the Court ſaid, that it is a general ſtatute, and is well enough ſet forth; and if he ſet it forth more particularly, it is at his own peril.

To the fourth objection the Court ſaid, that the judgment need not be ſet forth. The Books cited are on action of eſcape, where the judgment is the ground of the action, and the plaintiff claims merely under it; but here the landlord is not concerned in the judgment, nor claims anything under it: this point was, on ſolemn conſideration, reſolved before, in the caſe of *Wyndham v. Palgrave*, in the ſixth year of *George the Firſt*, in the king's bench (b).

(a) Cro. Jac. 135.

(b) Forteſ. Rep. 372.

Caſe 267.

Mathews *againſt* Lee and his Wife.

In debt againſt an heir on the bond of his anceſtor, if the defendant plead *riens per diſcent*, and the plaintiff reply that he had lands by diſcent, a verdict finding that he had ſufficient aſſets is good, without finding the value of the land.

MATHEWS brought an action in the *debet et detinet* againſt *Lee* and his wife, as heireſs of *Clement Wall*, in an obligation for him and his heirs for ſixty-four pounds.

The defendants plead, "nothing by deſcent at the time of the "writ purchaſed, or at any time ſince."

The plaintiff replied, that they had; and iſſue being joined, a verdict was found for the plaintiff, that they had ſufficient aſſets at the time of the writ purchaſed.

IT WAS MOVED *in arreſt of judgment*, that the finding was ill, for the replication being according to the ſtatute, the jury ſhould conſequently find the value of the lands.

S. C. 1. Barnes, 329.
Co. Lit. 227.
Plowd. 140.
1. Lev. 130. 224.
Co. Car. 151.
Show. 244.

WILLES, *Chief Juſtice*, ſaid, three things were to be conſidered, *viz.* the action, the replication, and the plea.—As to THE ACTION, he and all the Court held, that all the proceedings here were at common law, and that the finding was good; for at common law the action lay againſt the heir in reſpect of the lands deſcended, and he was chargeable only whilſt he had aſſets, and if he had aliened the land before the writ purchaſed. "Nothing by deſcent at the time of the writ" was a good PLEA and bar to the action, for he was not chargeable with reſpect to his perſon, except for pleading a falſe plea; and then if aſſets were found, though not to the value, he was liable to the whole debt for pleading that he had no aſſets when in truth he had. So when an executor pleads, "*never exe*"*cutor.*" To remedy which diſadvantage to the creditor, the ſtatute was made which gives a replication that he had aſſets by deſcent before the writ purchaſed, and directs that the jury find the value of the lands, becauſe judgment be given to the value of the lands deſcended againſt the heir as for his own debt (if he has aliened the lands by deſcent), but not againſt the alienee: and half the heir's lands may be extended on an *elegit*; and THE REPLICATION at common law concluded to the country; but on the ſtatute by averment to give the party an opportunity to prove he had not lands by deſcent; and the ſtatute takes not away the common law. And

FORTESCUE ALAND, *Juſtice*, ſaid, if the replication had been by the ſtatute, he could not have a writ of enquiry, becauſe the ſtatute expreſsly ſays, the value ſhall be found by the ſame jury.

Caſe 268.

Pindar *againſt* Smith.

On a covenant to give notice to a particular perſon, a plea of performance ſtating the notice but miſtaking the *Chriſtian name* of the party to whom it was to be given, is immaterial.

DEBT ON AN OBLIGATION for two thouſand pounds for the performance of covenants of an indenture between *Roberts* and *Pindar* (being ſheriff) of the one part, and *Smith* and others on the other part. The defendant pleaded performance, &c.

WRIGHT, *Serjeant*, took two objections to the defendant's plea:

FIRST, That where in the covenant it was contained that *Pindar* (one of the parties to the indenture) ſhould inſtitute no action or outlawry without giving notice to *John Stanyhaff* (who in the former part of the indenture was named *Joſeph*); and he pleads, that he inſtituted no action without acquainting *Joſeph*, whereas the covenant was to acquaint *John*.

And to ſupport this objection he cited the caſe of *Harvey* v. *Stock* (a), on a replevin-bond to appear and proſecute, and return the diſtreſs to *Thomas Haw*; and being removed into this court by *certiorari*, the plaintiff pleaded that the ſaid *Thomas* did not appear and proſecute, &c. whereas it ſhould be the ſaid *Rebecca*; and he quoted 2. *Saund.* 302. 305.

THE SECOND OBJECTION was, that the defendant ſhould have pleaded with a *profert*; and to prove that he ſhould have ſo pleaded, he cited the following caſes: 2. *Salk.* 498. 6. *Mod.* 237. 1. *Saund.* 8, 9. 1. *Sid.* 308. & 425. 1. *Vent.* 37. *Bro. Monſtr. de Faits*, 28. *Keilw.* 71. 1. *Roll Rep.* 20. The defendant is obliged to give *oyer*, if the plaintiff demand it; and 10. *Co.* 92. parties and privies ſhould ſhew forth the deed; and he admits himſelf both party and privy by pleading performance; and he acts in his office under that covenant. As to the objection, that it is the deed of the covenantee, and conſequently the covenantor cannot produce it, as 10. *Co.* 92. *Co. Lit.* 225. *b. Cro. Jac.* 217. *Dy.* 277. *Plowd.* 55. and 148. *W. Jones*, 377.; that a ſtranger ſhall not be forced to ſhew forth a deed; and alſo, that as all the covenants in this deed were for the benefit of the plaintiff, and the defendant can claim nothing by them, he ſhould not be obliged to produce it; he anſwered, that if the covenantor ſwear he had not a counterpart, or that he loſt it, the plaintiff, by the favour of the Court, ſhall give him *oyer*; and a ſtranger he cannot be, being a party to the deed; and he had a benefit by the covenants, being the conſideration on which his office was confirmed to him, and by which he received his fees.

In debt on bond for performance of covenants, performance may be pleaded without a *profert*.

THE COURT held, that THE FIRST OBJECTION was of no force, and not like the caſe of *Harvey* v. *Stock*; for *Thomas* had been named before, and ſo a ſubſtantial variance; but here there is no *John*, and it appears *Joſeph* muſt be meant.

WILLES, *Chief Juſtice*, as to THE SECOND OBJECTION, ſaid, that in an action of covenant the plaintiff ſhall ſet forth the deed, becauſe the breach of the covenant is the ground of this action; but in an action for the penalty in a bond to perform covenants, the defendant ſhall ſet forth the deed, becauſe it is the ground of his defence. But would adviſe.

(a) Eaſter Term, 10. *Geo.* 1. Harvey v. Stokes, Comy. 566.

Pindar against Smith.

Denton and Fortescue Aland, *Juſtices*, were clear for the plaintiff on the reaſons given. But

W. Fortescue, *Juſtice*, thought it hard that the plaintiff, by a miſtake of the defendant's, ſhould recover ſo great a ſum without any breach ſhewn; and if he could ſhew any, he may the more readily waive the advantage he got by pleading, and try the merit. Wherefore he thought it ſhould be ſpoke to again.

MICHAELMAS TERM,

The Twelfth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt. Chief Juſtice.*
Sir Francis Page, *Knt.* }
Sir Edmund Probyn, *Knt.* } *Juſtices.*
Sir William Chapple, *Knt.* }
Dudley Ryder, *Eſq. Attorney General.*
John Strange, *Eſq. Solicitor General.*

The King *againſt* Willis.

Caſe 269.

MR. STRANGE, *Solicitor General*, ſhewed cauſe why the Court ſhould not make abſolute a rule for a *mandamus* directing the ſteward of the borough of *Chriſt-Church* to hold a court-leet, and to charge the jury to make proper preſentments; and that being ſworn, they may preſent *John Dale* as the perſon elected mayor, or ſhew cauſe to the contrary.

A *mandamus* granted to the ſteward of a borough to hold a court-leet, and to preſent a particular perſon as the perſon elected mayor.

The *mandamus* in this caſe being to direct a jury to preſent a certain perſon as duly elected mayor of the borough of *Chriſt-Church*, it might as well be moved to have a *mandamus* to a grand jury, &c. to find a bill; for all juries are ſworn to preſent things as they appear before them. And this is ſuch a new kind of *mandamus* as never was moved for before, except in *Comb.* 239.; and they ought to have a general *mandamus.*

Raym. 431.
1. Sid. 40.
2. Lev. 18.
2. Stra. 797. 893.
1. Burr. 127.
B. R. H. 261.
5. Com. Dig. "Mandamus" (A.).

MR. SERJEANT EYRE and MR. CHUTE argued in ſupport of the rules, that a general *mandamus* in this caſe would be uſeleſs, and *mandamus's* are not always granted in general terms. The ſtatute of 11. *Geo.* 1. c. 4. is a remedial law, and therefore ought to be ſo expounded as to remedy defects. And this caſe is within the act 11. *Geo.* 1. c. 4. ſ. 3. There is no colour to ſay in this caſe that this is predetermining the right of election; they may return that the perſon is not duly qualified.

Lee, *Chief Juſtice*. The clauſe of the act of parliament relates to preſentments of perſons elected. This rule directs: FIRST, That there ſhall be a court-leet held by the ſteward for the borough of *Chriſt Church*; SECONDLY, That he charge the jury to make proper preſentments; THIRDLY, That being ſworn they may preſent *John Dale* as being elected mayor. If he is not elected, it may be ſo returned to the *mandamus*; and it is not at all final to them, nor are they precluded. Neither do I ſee any inconvenience in granting a *mandamus* in this way; the next rule being, that they preſent *John Dale*, or ſhew cauſe to the contrary.

Page, *Juſtice*, was of the ſame opinion.

Probyn, *Juſtice*. Unleſs this *mandamus* is granted, as it is prayed, it will be ſaying that the borough of *Chriſt-Church* is not within the ſtatute. If there is no way to compel the jury to preſent, the ſteward will always have an excuſe for not admitting and ſwearing a mayor for want of the jury's preſentment. Therefore I think the *mandamus* neceſſary.

Chapple, *Juſtice*, was of the ſame opinion. I think the rules within the remedies of the act. It is not neceſſary that the rule of Court ſhall ſpecify the whole *mandamus*, the officer muſt return it.

The Court ordered the rule to be made abſolute, and notice to be given purſuant to the act.

HILARY TERM,

The Twelfth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt. Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
Sir William Chapple, *Knt.*
Dudley Ryder, *Eſq. Attorney General.*
John Strange, *Eſq. Solicitor General.*

Olive *againſt* Ingram.

Caſe 270.

A woman may be choſen *ſexton*, and may vote at elections.

S. C. 2. Stra. 1114.
13. Viner Abr. 159.

THE QUESTIONS in this caſe (*a*) were two: FIRST, Whether a woman be capable of being choſen into the office of *ſexton?* and, SECONDLY, Whether a woman can vote at ſuch election?

IT WAS OBJECTED *againſt the competency of the ſex* on theſe occaſions, that they are under a legal incapacity of bearing public offices of truſt; that they cannot either act perſonally, or make a deputy; that a woman is not bound even to take an oath of allegiance, nor can ſhe vote for member of parliament.

ON THE CONTRARY *it was ſaid*, That there was no judgment or experience neceſſary for performing this office; and as to their voting, there was no legal reſtraint, but they are not compellable; and

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(*a*) This was an action of *aſſumpſit* for money had and received to the uſe of the plaintiff, on which a caſe was made for the opinion of the Court.—THE CASE ſtated, "that there was a vacancy in the office of ſexton of the pariſh of *St. Botolph without Biſhopſgate*; that the plaintiff and *Sarah Bly* were candidates; that *Sarah Bly* had one hundred and ſixty-nine indiſputable votes, and forty which were given by women who were houſekeepers and paid to church and poor; that the plaintiff had one hundred and ſeventy-four indiſputable votes, and twenty-two other votes given by ſuch women as aforeſaid; that *Sarah Bly* was declared duly elected."

OLIVE *againſt* INGRAM.

the reaſon why they did not vote for members of parliament was, ing in they were not contributory to the expences, the heir com- becauſe the place of the anceſtor, and not from any legal reſtraint.

To ſupport the former opinion were cited, 2. *Inſt.* 17. 2. *Cro.* 18. 1. *Inſt.* 107. *b.* *Litt.* 379. 1. *Cro.* 389. 1. *Sid.* 355. 1. *Vent.* 105. *Vaugh.* 181. 4. *Inſt.* 4, 5. For the latter, *Blunt's Tenures*, 47. 3. *Keb.* 32. *Hob.* 143. *Prideaux of Churchwardens*, 35. & 55.

LEE, *Chief Juſtice.* This may be a very extenſive determination, if the uſage of not voting has avoided the right of voting only where private property is concerned. The queſtion here is, Whether a woman is to be taken within the general words "of "all perſons paying ſcot and lot?" In *Brady's Append.* 35. *Lady Packington* returned two members to parliament to ſerve in her name. It was ſaid to be declared by the Judges, in the caſe of *Coates v. Liſle*, in the fourteenth year of *James the Firſt*, that clergymen could not vote. By a collection of *Hakewell's*, in the caſe of *Catharine v. Surry*, the opinion of the Judges, as he ſays, was, that *a feme ſole*, if ſhe has a freehold, may vote for members of parliament: and by this it ſeems as if there was no diſability: but the nature of the office to be executed may determine this queſtion.

Afterwards, in *Trinity Term*, in the twelfth and thirteenth year of *George the Second*, 1739,

STRANGE, *Solicitor General*, argued, That uſage is the only evidence of right at common law; and as their claim is at common law, they ought to ſhew it, or elſe *non uſer* ſhall be evidence of a waiver of their right, if ever they had any; that in all acts which concern the public, women are put in the ſame claſs with infants (*a*); and elections being already too popular, this would open a door to greater confuſion.

BOOTLE *contra* argued, That as they had in general power and capacity to vote, ſome diſability muſt be ſhewn to take it from them; that it was a juſt rule, that thoſe who contributed to maintain the elected ſhould be electors: and he anſwered the objection of *non uſer* by the difference between being exempted and being incapacitated.

LEE, *Chief Juſtice.* I thought this might have been a caſe of great conſequence; but as it depends merely on its own circumſtances, it cannot be drawn into precedent. Where the cuſtom was to ſerve as *conſtable* by turn according to their houſes, it was held, that the cuſtom would oblige an attorney; and there it is ſaid, that if the cuſtom was good, then a woman, if an inhabitant, may, if it come to her turn, be obliged to ſerve, which the law will not permit (*b*); but afterwards ſuch a cuſtom to chooſe by houſe-rows was held good (*c*), becauſe a woman may hire a ſubſtitute. And this opinion

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(*a*) Fitz. N. B. 162.

(*b*) Cro. Car. 389.

(*c*) Sid. 355.

does not thwart the caſe in *Croke*; for though ſhe may hire one, ſhe is ſtill incapable. And in the caſe of *The Queen* v. *Henley* (a), where the queſtion was, Whether a woman could be *overſeer*? it was held not; and the caſe of *Syd.* allowed to be law (b). But the nature of the office is the true conſideration with reſpect to the perſon who is to execute it. In the caſe of *the Town of Chelmsford*, a woman was appointed governeſs of the houſe of correction by order in court (c). The firſt queſtion will turn on the nature of this office. In 1. *Vent.* 153. the Court were in doubt whether they ſhould treat this as an office: at beſt it is but a public pariſh office, and it cannot be conſidered on a higher foot than governor of a houſe of correction or gaol-keeper (d). As to the ſecond queſtion, the right of voting in women is to be allowed only *ſecundum ſubjectam materiam*; and in the caſe of *Coates* v. *Liſle* (e), that women when *ſole* had a power to vote for members of parliament, was mentioned only to know if anything more could be ſaid or diſcovered on that and *Hakewell's Collection*; and, in reſpect that is but a private office, women when *ſole* may vote; but it would be a very different conſideration in voting for public officers, which concern the Government. And this is conſidered as a private truſt in the women, they having intereſt, as pariſhioners, in theſe things.

Page, *Juſtice*. I am of the ſame opinion as to the principal caſe. But I ſee no diſability in a woman from voting for a parliament-man.

Probyn, *Juſtice*. This caſe is divided into two queſtions, *viz.* their capacity of holding ſuch an office, and their right of voting. This caſe is very imperfectly ſtated, for it does not ſtate an office for life, years, or at will, nor the fees; ſo that the Court muſt form a judgment from *ſextons* in general. This is a ſervile miniſterial office, which requires neither ſkill nor underſtanding; and the caſe ſets forth, that women were rated, and paid rates, but does not ſay in this pariſh; and the beſt rule ſeems to be, that they who pay have a right to nominate whom they will pay to. But this cannot determine that women may vote for members of parliament, as that choice requires an improved underſtanding, which women are not ſuppoſed to have. The office of *churchwarden* is to take notice of all their pariſhioners, and of their behaviour, and to make certificates to the ſpiritual court; and as to the *conſtable*, the perſon whom ſhe ſubſtitutes is ſworn in, and is conſtable.

Chapple, *Juſtice*. It ſhould appear, that ſhe offered herſelf to this office; and as this is conſidered as a perſonal truſt, ſhe cannot depute; nor does it appear that women are liable to the contribution for *a ſexton*; nor is there any caſe adjudged that they are capable of electing ; the election of *a lecturer* is nothing but a ſubſcription who ſhall pay the lecturer.

(a) Eaſter Term, 10. *Anne.*

(b) But it is now ſettled, that a woman may be choſen overſeer.—See Rex *v.* Stubbs. 2. Term Rep. 395.

(c) 2. Ld. Ray. 1014.—See 2. Term Rep. 595.

(d) 3. Keb. 32 Dyer, 285. Hob. 148.

(e) 14. *Jac.* 1.

The caſe was adjourned for farther argument.

Marsh *for the plaintiff.* This is a ſpecial caſe made at the *niſi prius* upon an action, &c. for five ſhillings claimed by the plaintiff, as *ſexton* of *Saint Botolph's*, for that the plaintiff, being elected into the ſaid office by a majority of five votes, the defendant obtained a majority, and procured herſelf to be choſen by getting in women to vote ; and upon this caſe there are two points :

First, Whether a woman may be a candidate for the office of a ſexton ?

Secondly, Whether a woman has any right to vote for a ſexton ?

As to the first, This office ought not to be executed by a woman, becauſe it is a *circa ſacra*, for the exemptions of people in orders extends to clerks,&c. The caſe of *Armſtrong v. Liſle* (*a*) ſhews that ſuch officers muſt be men, notwithſtanding that women are favoured with clergy, and women and ſextons named together in the ſtatute 3. & 4. *Will. & Mary*, c. 9. In *Eyles' Caſe* (*b*) it is ſaid, that a ſexton may be a parſon ; that a *mandamus* lies for a ſexton ; and therefore a woman cannot be a ſexton. Beſides, it is fitted for men to clean and waſh the church, &c. ; and it would be ſervile work for a woman to dig a grave, as ſextons do ; and as to a woman having been governor to *Chelmsford* workhouſe, it is but a newly-erected one, and is by conſent and voluntary contribution, not *ex proviſione legis*, *ſed pactum.*

Secondly, A woman ought not to vote for this office. The reaſon why women vote in the great Companies is, becauſe they are ſpecial proprietors. The caſe of *The Attorney-General v. Nicholſon* (*c*) does not come up to this : there the parſon might have had the majority of men, and his adverſary might have had the women, for they do not appear to be diſtinguiſhed. Beſides, decency and the policy of the law exclude women from popular elections. They cannot vote for members of parliament, according to the expreſs opinion of my *Lord Coke* (*d*). They neither can, nor ever did, vote for a coroner (*e*). They are not compellable to come to the tourn, or leet, or county-court (*f*). They are incapable of being choſen conſtable, unleſs by cuſtom ; for *F. N. B.* 359. ſhews, that in other caſes they cannot be choſen, becauſe they cannot go to the county-court, where conſtables are choſen. In *The Queen v. Tucker* (*g*) it was adjudged, that a woman cannot be

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(*a*) Kely. 83. 93. Trem. 20. Skin. 670. Carth. 394. Comb. 410. Salk. 60. 12. Mod. 108, 109. 159. Holt, 63.

(*b*) 1. Vent. 143. 2. Keb. 82.

(*c*)

(*d*) 4. Inſt. 4, 5.

(*e*) 2. Inſt. 559.

(*f*) Fitz. N. B. 359.

(*g*)

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overſeer of the poor, and accordingly there was a *mandamus* to chuſe another (*a*); and the office of a ſexton is a much more improper office for a woman than that of an overſeer of the poor; and therefore women ought not to vote.

Kettleby *for the defendant*. Though women are not allowed to wear breeches, it is to be hoped that their petticoats ſhall not be taken from them; for there is no reaſon to ſay that women are not qualified to be ſextons, ſince they are qualified to pay ſcot and lot, and all poor rates, and to maintain a ſexton, and to execute offices, at leaſt by deputy. *Hobart*, 148. ſays, they may execute the office of conſtable by deputy. In a Book called *the Mirror of Juſtices*, a woman is ſaid to have been a juſtice of the peace. In *Eyles' Caſe* (*b*) it is, that a *mandamus* was granted for a ſexton, being an office for life, &c. This office is ſo deſigned, that a ſexton may be of either ſex (*c*); and the duty of the place being to look after the parſon's ſurplices and veſtments, and to keep the church clean, it will be better performed by a woman. Neither are women excluded offices *circa ſacra*; for in the laſt of Romans, verſe 1. mention is made of a woman, one *Phebe*, who is there called the *ſervant of the church*; ſhe might poſſibly be in ſome office analogous to that of a ſexton. So female ſervants or deaconeſſes are mentioned in antient Councils, when baptiſm was by immerſion. In *Michaelmas Term*, in the ſecond year of *Queen Anne*, a woman was made governor of a workhouſe at *Chelmsford* by the juſtices, and a motion to quaſh the order was denied, becauſe it might be executed by deputy, as in *Lady Broughton's Caſe* (*d*). The ſtatute 3. *Geo.* 2. c. 33. ſ. 8. which was made to provide a miniſter for *Deptford*, enacts, "That all pariſhioners paying, &c. ſhall vote, "&c.;" and the 3. *Geo.* 2. c. 3. is to the ſame effect; and women proprietors always vote in the great Companies. The caſe of *The Attorney General v. Nicholſon* (*e*) was an information in the exchequer in relation to admitting the miniſter of *Clerkenwell* pariſh, wherein it was objected, that women had voted, and that the parſon was choſen by a majority of women; but it was adjudged there, that women might vote in that caſe; and there is the ſame reaſon that they ſhould vote in the preſent caſe.

Lee, *Chief Juſtice*. The queſtion on the firſt point is, Whether a woman is incapable of being a ſexton? It is agreed, that by cuſtom a woman may be conſtable, and, I believe, churchwarden. As to their right to vote, I do not know that it has ever been determined that they have not a right of voting. And whether they have not antiently voted for members of parliament, either by themſelves or attorney, is a great doubt. I do not know upon enquiry but it might be found that they have. But as this

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(*a*) But it is now ſettled, that a woman may be appointed overſeer. Rex v. Stubbs, 2. Term Rep. 395.

(*b*) 1. Vent. 143. 153. 2. Lev. 18. Raym. 211. 2. Keb. 802.

(*c*) In Spel. Gloſſ. 497. Du Freſne. Skynner's Etymologicon. Bailey's and Chambers's Dictionaries, tit. "Sexton."

(*d*)

(*e*) Trinity Term, 1. *Geo.* 2.

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Olive *againſt* Ingram.

caſe ſhall be ſpoken to again, I ſhall give no opinion at preſent.

Probyn, *Juſtice.* The doubt can only be upon the nature of the office, whether it is improper to be performed by a woman or not? Why is not a woman as capable of taking care of veſtments as a man? There occurs to me no incapacity in a woman for this office. Some modern practices have indeed been introduced not ſo proper for a woman. The other queſtion is, Whether women may elect a ſexton? In elections for members of parliament, women are not now admitted, whatever they were formerly; but in pariſhes, why ſhould not they have a right to chuſe thoſe whom they help to maintain? That they are not allowed to vote for members of parliament is upon another reaſon, becauſe of the judgment required in it; which does not hold in the choice of a ſexton. In this caſe, women voted on both ſides, which is an admiſſion to their right. When women are choſen conſtables, they muſt take upon them that office, or they are puniſhable, and they muſt go to the tourn, &c. to be ſworn, or to a juſtice. So of the office of churchwarden, overſeer, &c. which is a greater office. Neither do I ſee any reaſon why they ſhould not have a right to vote. And that caſe in the exchequer which has been cited muſt have been determined by the votes of a majority of women, or it had been no caſe at all; and I think ſhe cannot be compelled to take that office.

Chapple, *Juſtice.* The queſtion, Whether a woman may be an elector? is the greateſt difficulty. And I think, that where women cannot take an office, they ought not to chuſe ſuch office. Nor can a woman be made a conſtable but under cuſtom; and where there is no ſuch cuſtom, I think ſhe cannot be compelled to take that office.

Lee, *Chief Juſtice.* In *Lady Packington's Caſe*, *Browne Willis* returns to parliament, that the ſheriff made a precept to her, as lady of the manor, to return two members to parliament.

But let this be ſpoke to again; which was, in *Hilary Term* 1738, as follows:

Dennison *for the plaintiff.* Two queſtions have ariſen in this caſe: First, Whether a woman is capable of executing the office of a ſexton? Secondly, Whether women are capable of voting for ſuch an office as ſexton?

First, Women are not admiſſible into the office of ſexton. Firſt, Becauſe it is a truſt; ſecondly, Becauſe it cannot be performed by deputy; thirdly, Becauſe it is of a public nature. The buſineſs of a ſexton is to keep the keys of the church, the ſacred utenſils, the holy veſtments, &c. In ſome places it is his duty to dig the grave and to ring the bell. No authority has been produced to ſhew that women are perſonally admitted to public places.

places (*a*). It is ſaid in *Prowſe's Caſe* (*b*) that a woman cannot be a conſtable, even by cuſtom. So in *Sir Walter Baynes' Caſe* (*c*), it is ſaid, that a woman muſt make a conſtable to ſerve for her, and that a cuſtom for her to ſerve in perſon is not a good one. The ſtatute 43. *Eliz.* c. 2. implies that women cannot be overſeers (*d*). Indeed a woman governed the workhouſe at *Chelmſford*.

Lee, *Chief Juſtice*. That caſe of *Chelmſford Workhouſe* is in the third volume of *Salkeld's Reports*, which has not been admitted to be of authority here; but I have ſearched the record, and it there appears that ſhe was made governeſs of a workhouſe; but I do not find in the crown-office that the Court made any rule upon it.

Dennison. It might be a womans workhouſe; and there is no other caſe to ſhew that the law permits either women or clergymen to hold places of public truſt and duty (*e*). There does not appear to be a cuſtom in this pariſh to make a deputy, therefore it muſt be taken to be on the general rule of law, that officers of truſts cannot make deputies (*f*). The office, in this caſe, differs from thoſe which women have by inheritance. This election is void becauſe ſhe is unfit for the office, and is *perſona minùs idonea*. A perſon unfit for an office cannot make a deputy, for there is no principal. Women cannot take the oath (*g*); her huſband ſwears; and there is an oath of office ſtated in this caſe.

The next queſtion is, Whether women can vote? They cannot vote for a member of parliament (*h*), neither can infants (*i*); their voting for parochial offices is a new thing (*k*). In ſome pariſhes they pretend to vote for lecturers, as they did in the caſe of *The Attorney General v. Nicholſon*, but it does not appear but that the majority might be men; and a lecturer is not a public officer but a private; for the rector can refuſe him the pulpit (*l*). Women having offices by inheritance, tenure, &c. is not like the caſe of a public office by election. This is an office which requires experience and ſkill. Women being patrons is not like this caſe. A woman muſt be capable of being choſen before ſhe is capable to vote, elſe it is begging the queſtion. In great companies women vote as proprietors; nothing can be inferred from their voting for churchwardens. Sometimes women are not included in the general words of "all perſons, &c." in ſtatutes. The fact that women are not compelled to come to the tourn, implies that the law was that they ought not to come. The fact of women having voted for a lecturer is no proof that they have any right to do ſo, any more than in the preſent caſe.

(*a*) Lord Coke in his Magna Charta, 2 Inſt. 17.; and Lady Ruſſell's Caſe, Cro. Jac. 18.; and the Counteſs of Pembroke's Caſe, Co. Litt. 107. b.

(*b*) Cro. Car. 389.

(*c*) 1. Sid. 355.

(*d*) But ſee 2. Term Rep. 395.

(*e*) 1. Vent. 105.

(*f*) Vaugh. 181. Litt. ſ. 379.

(*g*) 2. Inſt. 121. Litt. ſect. 87, 88.

(*h*) 4. Inſt. 4, 5.

(*i*) See ſtatute 7. & 8. *Will.* 3. c. 25.

(*k*) See the ſtatute 3. *Geo.* 2. c. 3. and 33.

(*l*) See Rex v. Field, 4. Term Rep. 125.

WYNNE, *Serjeant, for the defendant.* As to THE FIRST POINT, there is no incapacity in women to execute ſuch an office, for it is properly a ſervice. Women may execute ſuch an office in perſon; they may be guardians, adminiſtrators, executors, and take the oaths of office. Women may make contracts of marriage; and there the law preſumes them to be riper two years ſooner than men. *Lady Boughton (a)* was turned out of the office of keeper of a priſon, but not for incapacity, but for miſbehaviour, and that was an office where they return writs, &c. and then the law was in *Latin*. Ladies may guard caſtles, &c. Women have held by military tenures (*b*). In *Pegu (c)* there is a grant of a caſtle to a lady. Women have performed very high offices (*d*). Clerks have held by knight's ſervice (*e*). The office of champion at the laſt coronation was in a woman, who applied in that caſe to the crown to make a deputy *(f)*. The office of clerk of the crown in the king's bench was granted to a woman (*g*). The office of high conſtable has been born by a woman (*h*). The law allows women to be even queens; her late majeſty QUEEN CAROLINE was left regent and guardian of this realm. Women are patrons of churches; they have donatives, and there they are as ordinary; they are capable of impropriations, which are *circa ſacra*, and they are regarded in law as parſons; many nunneries had them before the Reformation (*i*). Perſons incapable may make a deputy in this caſe (*k*) notwithſtanding. A woman, one *Alice Pater Noſter*, held by ſaying a prayer (*l*), whence ſhe had that name; and ſurely that is *circa ſacra* with a witneſs. Women in neceſſity have been allowed to baptize. In an old edition of the *Teſtament*, in the year 1574, a woman is called "a miniſter of the church (*m*)". Quakers allow women to preach.

The SECOND POINT is, Whether they can vote in favour of a candidate for this office; and if they can execute it, *à fortiori* they may vote in an election for this office. No authority has declared them incapable, and their forbearance is no argument; for there is not one man in twenty that goes to a veſtry. Women vote in great companies: they ought to vote who pay (*n*) the rates.

DENNISON *in reply*. The citations from *Lord Coke (o)* and *Fitzherbert (p)* are only that a woman cannot be diſtrained to come to the tourn, but they do not ſay that they muſt not come, only that they cannot be forced to come; and that is where there is no other land of the heir. The writ directs to chuſe *indoctum par-*

(*a*) Lady Boughton's Caſe, Lev. 3. 3. Keb. 32.

(*b*) Blount's Tenures, 47. See alſo Prynne on Co. Lit. 221.

(*c*) Page, 215.

(*d*) Co. Lit. 107.

(*e*) Co. Lit. 99.

(*f*) Co. Lit.

(*g*) Shower's P. C.

(*h*) Dyer, 285.

(*i*) Dugdale,

(*k*) Hob. 148.

(*l*) Blount's Tenures, 51.

(*m*) Laſt chapter of the Epiſtle to the Romans. Firſt Book of Kings, chap. ii. "*The child Samuel miniſter'd, &c.*"

(*n*) Dr. Prideaux' Office of Churchwardens, ſect. 35. 55.

(*o*) 4. Inſt. 5.

(*p*) Fitz. N. B. 168. 355 359.

liamentum (a). The reaſon why women do not vote in certain caſes is, becauſe they are exempt in ſuch caſes from contributions; but here they contribute to pay ſcot and lot, and are therefore, by parity of reaſon, as well intitled to vote as men (b). It is an argument *à fortiori* in this caſe, that if a woman can vote for *a lecturer* ſhe may vote for *a ſexton*, who is but a ſervant to the pariſh.

Lee, *Chief Juſtice.* This caſe may be very extenſive in its conſequences, though not in itſelf. The uſage has been to avoid any woman's voting, except in companies, &c. therefore I think it proper to take further time in this caſe upon account of its importance.

Chapple, *Juſtice.* Where an act of parliament impowers all perſons to vote, &c. it ſhould, I think, extend no farther, though the words are very general, than to thoſe who may lawfully vote.

Lee, *Chief Juſtice.* I have ſeen a manuſcript treatiſe (c) which ſays, that it was the Judges opinion, that the clergy had no right to vote for members of parliament. In the caſe of *Holt v. Lyle* (d) it is determined, that a *feme ſole* freeholder may claim a voice for parliament men, but if married her huſband muſt vote for her. A woman has been returning officer (e). A ſexton's office is rather a ſervice than an office. It has been adjudged that women may have the office of gaoler (f). But I would have this ſtand over for further conſideration.

Page, *Juſtice.* Her capacity to hold and execute one office does not make her capable of holding and executing another.

Probyn, *Juſtice.* An excuſe from acting, &c. is different from an incapacity of doing ſo. The caſe of *Holt v. Lyle*, mentioned by my Lord Chief Justice, is a very ſtrong caſe.

Lee, *Chief Juſtice.* I would not be underſtood to declare it to be my opinion that women may vote for members of parliament; I only mention what I found in a manuſcript by the famous *Hakewell*, but give no opinion at preſent, becauſe I would further conſider of this matter. I ſhould be glad of another argument upon this.

Let it be ſpoken to again: and it was ſpoken to again in *Trinity Term* 1739.

Mr. Solicitor General *for the plaintiff.* This queſtion comes before your lordſhips upon a caſe which was made at the

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(a) Prynne on 4. Inſt. 13. 32. 4. Prynne's Brevia Parliamenti, 431.

(b) The Serjeant cited the caſe of an information by the Attorney-General at the relation of *Fuller*, in which men and women had voted promiſcuouſly; but the Chief Juſtice ſaid, that caſe could not be adduced as any authority in the preſent caſe, becauſe the queſtion reſpecting the right of the female voters had not been raiſed in it. *MS.*

(c) Hakewell's Mod. Ten. Parl.

(d) 4. *Jac.* 1.

(e) Brady's Appendix to his Hiſtory of Boroughs, 25.

(f)

OLIVE *againſt* INGRAM.

Sittings in *London*, *&c.* Upon the former arguments two points were made, FIRST, Whether a woman can be a ſexton? SECONDLY, Whether ſhe can vote for one?

As to THE FIRST POINT, every thing having been already ſaid upon it, I ſhall not trouble the Court upon that, though I do by no means waive it.

THE SECOND POINT is a queſtion of great conſequence; for the ſame reaſon which allows women to vote in this caſe, will extend their vote to many other inſtances. The office of ſexton is a public office, and it is upon that foundation that *a mandamus* was granted for it, in *Eyles' Caſe (a)*. The novelty of this claim can be the only reaſon that there are ſo few authorities to this point. In 4. *Inſt.* 5. it is agreed, that women cannot vote for coroners, or members of parliament, though they are freeholders. Upon the former argument it was inſiſted to be in eaſe of women that they did not vote for members of parliament, and that therefore they were not obliged to pay them their wages; but it appears by *the Regiſter*, 192. *a.* that they did pay wages, for they were to be levied *de communitâte comitatûs*. The policy of the law has thought women unfit to judge of public things, and placed them upon a footing with infants (*b*); they do not go to court leets, and cannot be outlawed, but muſt be waived (*c*). In the caſe of *The Attorney General v. Nicholſon (d)* it does not appear but that there might be a majority of men for the perſon elected; and *a lecturer* is no public officer; he may be removed at the will of thoſe who pleaſe to pay him; and it is a private election. *Weſt (e)* ſays, that all fiefs were originally maſculine, and women were excluded from the ſucceſſion of them becauſe they cannot keep ſecrets. *Mr. Serjeant Wright (f)* ſhews, that a woman is excluded from military tenures and from councils, *quia quæ audit reticere non poteſt.* It has been adjudged that women cannot be overſeers of the poor, though ſubſtantial houſholders. By the 7. & 8. *Will.* 3. c. 25. ſ. 8. infants cannot vote; and women are perpetual infants. Where *Magna Charta* gives a woman trial *per pares* it is by men, whether lords or commoners; and for theſe reaſons women ought not to vote, &c.

BOOTLE *for the defendant.* The law has certainly in ſeveral caſes given greater privileges to men than to women; and it is true, that a woman cannot be a paſtor by the divine law (*g*); but this is an office which may be executed by any perſon whatſoever, and requires no capacity or judgment at all; and it has been greatly doubted (*h*) whether it be an office at all, or only a ſervice. A woman may be a conſtable by hiring a deputy (*i*), and there is the ſame reaſon ſhe ſhould be a

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(*a*) 1. Vent. 143. 2. Lev. 18.

(*b*) 4. Inſt. 45.

(*c*) Co. Lit. 122.

(*d*) Trinity Term, 1. Geo. 2.

(*e*) Weſt's Inquiry into the manner of creating Peers.

(*f*) Wright's Tenures.

(*g*) Colt v. Glover, Hob. 148.

(*h*) 1. Vent. 153. See alſo 2. Lev. 18. which ſeems to be the ſame caſe.

(*i*) Sir Walter Bayne's Caſe, 1. Sid. 355.

ſexton, and ſtronger; for a conſtable is to keep the peace, and to do other acts wherein the public is concerned, which are no part of a ſexton's office. That women cannot perform the ſervices annexed to military tenures, or have quarantine out of the *caput baroniæ*, *&c.* are abſolutely foreign from the preſent caſe. Women have executed more important truſts than the preſent: a woman has born the office of high-conſtable of *England* (*a*): a woman has been a free ſuitor to the lord's courts (*b*), and ſhall be admitted to do homage and fealty (*c*). Incapacity ſhall not be preſumed, and it is not proved by *non uſer*; and women polled on both ſides in this caſe, &c.

LEE, *Chief Juſtice.* This caſe is of great importance in its conſequences and influence. In *Cro. Car.* 389. where it became a queſtion, whether a woman ſhould ſerve the office of conſtable in her turn, it was held that ſhe was incapable; afterwards, in *Siderfin*, there was a determination which avoids that, upon the principle of her appointing a deputy, and ſo does not thwart *Cro. Car.* 389. In the caſe of *The Queen v. Henley* (*d*), two perſons were nominated for the juſtices to chuſe an overſeer; one of them being a woman, they refuſed; and upon a motion for *a mandamus* to them, the Court held that they did right in refuſing it (*e*). In the preſent caſe the nature of the office muſt be the conſideration. In *Lady Boughton's Caſe* (*f*) a woman was allowed to be keeper of *the Gatehouſe.* The nature of a ſexton's office is pretty well known, though it differs in different places; it muſt be now conſidered as an office, though the Court doubted of that at firſt, till they were certified of its being an office for life, &c. Women are certainly excluded from tenures merely maſculine or military. As to the queſtion in reſpect to women's right of voting, I think that very much depends upon the determination of the firſt queſtion. This queſtion muſt be determined ſingly upon the foot of the common law, without regard to the uſage of pariſhes in *London*: the caſe is defectively ſtated in not ſtating that the women, being houſholders and rated, were unmarried; but in this caſe they muſt be taken to be ſo. What inclines me to think that they may be admitted to vote in this particular inſtance is, that the ſexton's duty ſeems to be in the nature of a private truſt, he having only the cuſtody of the *bona parochianorum*, *&c.* and it does not ſeem a thing of a public conſideration, in which I incline to think women have not a right of voting, though they are not poſitively excluded.

PAGE, *Juſtice.* I am of the ſame opinion, and that the votes are good votes, and that ſhe is capable of the office, &c.

PROBYN, *Juſtice.* This caſe does not ſtate whether this is an office for life, years, or will, and what the fees of it are, ſo that it is imperfectly ſtated. Sextons in different pariſhes have different

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(*a*) See Vaillant's edit. Dyer, 285.

(*b*) 2. Inſt. 119.

(*c*) Fitz. N. B. 257.

(*d*) Eaſter Term, 10. *Ann.*

(*e*) But ſee Rex *v.* Alice Stubbs, 2. Term Rep. 395.

(*f*) 3. Keb. 32.

Olive *againſt* Ingram.

duties; ſo that, as this caſe is ſtated, I do not ſee that it will influence any other caſe of a ſexton. It is a miniſterial or ſervile office in general. Is there anything in it that requires ſkill or judgment, or that a woman cannot do as well as the wiſeſt man in the pariſh? It rather requires ſtrength. This caſe does not ſtate, that the women who are rated and pay, do ſo to this pariſh, ſo that it can only be taken by implication; and they who pay perſons ought to chuſe thoſe perſons, for they who pay ought to chuſe whom they will pay. I cannot ſee how this will extend to any ſuperior office, as members of parliament, military employs, &c. A conſtable was once a great peace officer, how contemptible ſoever he may be thought at preſent. This is an inferior office, and was not held to be a public one without ſome difficulty; and this caſe ſtands diſtinct from other caſes of offices, upon its own particular circumſtances. This is my opinion as at preſent adviſed, ſaving I may be convinced by better reaſons.

Chapple, *Juſtice.* It were to be wiſhed that this caſe had been better ſtated. As to the nature of this office, it is various in different places. Women are in many reſpects in law, as well diſtinguiſhed from infants as men, being *ſui juris* till they are married. Though it is not ſtated in this caſe that women have paid, yet they are liable to rates; but that does not give them a right of electing to other offices. The caſe of *The Attorney General v. Nicholſon* is no authority in this caſe, for the office of lecturer is at will; therefore I ſhould be willing to take a day or two to conſider this, if my Lord Chief Justice pleaſes; but if my Lord is ſatisfied, this is my opinion at preſent.

Lee, *Chief Juſtice.* I think this differs from all other offices, and can extend to no other; I do think this muſt only be conſidered as a private thing. The judgment muſt be, that the plaintiff muſt pay the coſts of her nonſuit.

Caſe 271.

Vaughan *againſt* Brown.

To debt *as executor*, if the defendant plead judgment recovered by way of *retainer*, and no aſſets *ultra*, and the plaintiff reply "executor "*de ſon tort*," the defendant may rejoin, *puis darrein continuance*, that he is adminiſtrator(*a*) S. C. 2 Stra. 1106. S. C. And. 328.

Debt brought as executor. The defendant pleaded, that he had recovered two hundred and forty pounds upon a judgment in the common pleas, *et nil aſſets ultra*; to which the plaintiff replied, that the defendant was executor *de ſon tort*; and then the defendant pleaded, after the *laſt continuance*, that he was *adminiſtrator*; and to this plea, as adminiſtrator, the plaintiff demurred.

Two queſtions were now argued:

First, Whether an executor may retain without proving himſelf lawful executor? And to prove that he could not, was cited 1. *Mod.* 308. wherein the plaintiff declared againſt the defendant as executor, who pleaded that he took upon him the burthen of the

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(*a*) See Curtis *v.* Vernon, 3. Term Rep. 587.

VAUGHAN *againſt* BROWN.

the will, and retained ſo much for a debt due to him, and that he had no other aſſets; the plaintiff demurred, becauſe it did not appear that the defendant was not executor *de ſon tort*, who cannot retain; and judgment was given for the plaintiff; and *Coulter's Caſe (a)*, that an executor *de ſon tort* cannot retain.

SECONDLY, Whether this ſecond plea, *puis darrein continuance*, was not a waiver of the firſt? and to prove that it was a waiver, cited *Cro. Jac.* 26. *Hob.* 81. *Co. Ent.* 517. *Raſt. Ent.* 549. *Moor*, 871. *Salk.* 178.

FOR THE DEFENDANT *it was anſwered*,

FIRST, That if an executor may not retain without proving himſelf lawful executor, yet an adminiſtrator may retain, 1. *Roll. Abr.* 922. 2. *Roll. Abr.* 684. 1. *Brownl.* 75. *Bond v. Green.*

SECONDLY, That the defendant's plea of adminiſtrator is not a waiver, *Peirce v. Paxton (b)*, *Williamſon v. Norwich (c)*, and agreed in 2. *Vent.* 180. 1. *Roll. Abr.* 923. 2. *Roll. Abr.* 554. *pl.* 2. 4.

LEE, *Chief Juſtice.* The declaration in this caſe is againſt the defendant as executor generally; he pleads a judgment, and thereupon inſiſts upon a right of retainer; and the plaintiff's replication is, that the defendant is executor *de ſon tort*; and ſo it ſtands upon the pleadings. The plaintiff's replication has certainly avoided the defendant's defence; for an executor *de ſon tort* cannot retain. Then the defendant has pleaded, as adminiſtrator, a plea *puis darrein continuance*, and the adminiſtration taken out afterwards will ſo far purge the original wrong as to enable him to retain a juſt demand; but if it was obtained after the action, it cannot abate the plaintiff's ſuit. Where there is an original plea, and a plea *puis darrein continuance*, the ſecond waives the firſt, except where there is a demurrer, *Hob.* 81. though contradicted in *Salkeld*; but if this kind of contradictory plea were to be allowed, it would be very much to the prejudice of the plaintiff.

PAGE, *Juſtice*, inclined likewiſe to allow the demurrer, and cited *Forreſt v. Ballard (d)*.

PROBYN, *Juſtice.* None of the caſes cited came up to this, as it ſtands upon the pleadings. A plea *after the laſt continuance* is a waiver, but the reaſon of this is becauſe it conſiſts of different and contrary matters; but it is not a waiver, becauſe it is a new defence, if it can be made conſiſtent, and if the plaintiff can rejoin to it. The firſt defence in this caſe is as executor, the ſecond as adminiſtrator; and whether theſe are inconſiſtent or not, I am at preſent in doubt.

(a) 5. Co. 30. Cro. Eliz. 630.

(b) 12. Mod. 541. 1. Ld. Ray. 691. Holt, 560.

(c) Stiles, 337.

(d) Cro. Eliz. 810.

VAUGHAN *againſt* BROWN.

CHAPPLE, *Juſtice.* The difficulty with me is, whether the plaintiff is not precluded by this defence. It is hard if a man has a true defence, that he muſt not plead it; and though at the time of the firſt plea the defendant was executor *de ſon tort*, yet his adminiſtration is a matter of fact ſubſequent, and they ſeem to me to be but in the nature of one defence; and it is a rightful one if it be well pleaded, which is the matter now in queſtion. And I am in ſome doubt, whether the defendant could have pleaded any otherwiſe, or whether the plaintiff can take any advantage of this to give any anſwer to it: but I am not ſatisfied that the pleading is bad (*a*).

LEE, *Chief Juſtice.* The damage to the plaintiff, if he cannot controvert the judgment, is the material conſideration; but if it cannot be ſhewn that the plaintiff can controvert this judgment, and that he is not precluded, I think it is. But let this be ſpoken to again.

BARRETT *for the plaintiff* (*b*). This is an action of debt upon bond for forty pounds, to which the defendant has pleaded a judgment in the nature of a retainer; the plaintiff replies, that he is executor of his own wrong; the defendant, after the laſt continuance, pleads adminiſtration; to which the plaintiff demurs, and there is a joinder in demurrer. The defendant cannot retain in this caſe as tortious executor (*c*). After *the laſt continuance* nothing can be pleaded without leave (*d*). New matter cannot be pleaded after the laſt continuance (*e*). It is the defendant's *laches* not to have taken out adminiſtration ſooner (*f*). *Laches* ſhall prejudice widows or infants (*g*). And this is the defendant's *laches* at the time of the firſt plea (*h*). This laſt plea is a waiver of the firſt, becauſe a man cannot have two bars at common law (*i*). *Hob.* 81. is denied in *Palmer v. Barker* (*k*). Theſe pleas are inconſiſtent with each other. There is a diſtinction between executors and adminiſtrators (*l*). This laſt plea cannot ſtand with the firſt. A perſon, to enable himſelf to retain, ought to entitle himſelf to the executorſhip, which the defendant has not done upon theſe pleadings (*m*). If the firſt plea is waived, the ſecond cannot ſtand, and is in abatement, ſo cannot be pleaded in bar as firſt (*n*). When a ſecond plea contains matter not purſuant to the former, and which does not fortify it, that is a departure. Adminiſtration does not relate in all caſes (*o*).

(*a*) Skin. 274. Salk. 296. Moor, 126. pl. 273.

(*b*) In Hilary Term, 1738.

(*c*) 1. Roll. Abr. 927. Yelv. 137. Boulſter's Caſe, 5. Co.

(*d*) Reg. Pla. 63. Haſe's Analyſis, 138.

(*e*) Bro. Abr. "Continuance" 168.

(*f*) 5. Co. 88.

(*g*) Bro. Abr. "Laches," 57. pl. 14. Co. Lit. 32. b. 131. a.

(*h*) Stiles, 337.

(*i*) Bro. Abr. "Waiver" 320. pl. 23.

(*k*) Salk. 178.

(*l*) Plowd. 280. 2. Inſt. 397. 5. Co. 28.

(*m*) 1. Mod. 208. 1. Vent. 303. 1. Roll. Abr. 907.

(*n*) Salk. 296. 2. Leon. 190.

(*o*) Co. Lit. 150. 2. Vent. 180. Salk. 297.

Hob. 49. is a ſtrong caſe for the plaintiff. The plaintiff is hereby precluded of his defence. This differs from the caſe in *Stiles*, 337. becauſe there the plaintiff was not hindered from his defence, as he is now; and a demurrer admits nothing but what is well pleaded. And therefore judgment was prayed for the plaintiff.

Hasstell *for the defendant.* Though tortious *executors* cannot retain, yet certainly *adminiſtrators* may retain (*a*). This is not a departure, but a ſtrengthening our plea. *Co. Lit.* 304. is the caſe of rejoining a feoffment, where the plea was a leaſe and releaſe, They cited *Atkinſon v. Rawſon* (*b*), that tortious executors cannot retain, which is not our caſe. The defendant has not pleaded executorſhip, but a judgment; and this fortifies his plea of a right to retain. *Williamſon v. Norwich* (*c*) is the ſame caſe, and expreſs to this. And adminiſtration purges the wrong in this caſe, and relates to the inteſtate's death (*d*). The caſe of *Sir Thomas Cockin* (*e*) is a plea after the laſt continuance. 2. *Vent.* 179. is not like this caſe. *Boulter v. Ireland*, in *Moor*, *Coke*, and *Cro. Eliz.* is, that tortious executors cannot retain. *Moor*, 871. and *Hob.* 81. or 84. do not relate to this caſe. The caſe of *Baker v. Palmer* (*f*) does not affect us, becauſe we only waive our executorſhip. We have not been guilty of any *laches*, for adminiſtration is a judicial act. *Styles*, 337. proves, that an adminiſtrator may retain in this caſe. In this caſe, both adminiſtrators and executors may retain. Adminiſtration relates to the inteſtate's death in the preſent inſtance. *Hob.* 49. does not extend to us. And therefore it was hoped that the defendant might have judgment.

Lee, *Chief Juſtice.* If this were a matter exiſting at the time of the firſt plea, it could not be pleaded after the laſt continuance, or if there were any *laches* in the defendant which were made apparent to the Court. I do not ſee but this plea is properly pleaded, &c. This is an action of debt upon bond brought againſt the defendant as executor; he pleads a judgment due to himſelf upon which he has recovered; and ſo juſtifies by way of retainer, &c. If this ſtood only between the parties, the defendant muſt be taken to be lawful executor. Then the plaintiff in his replication diſcloſes, that the defendant is a tortious executor, which avoids his plea of retainer; for doubtleſs an executor *de ſon tort* cannot retain, becauſe he ſhall take no advantage of his own meddling without a lawful authority. 5. *Rep. Coulter's Caſe.* Then the defendant rejoins after the laſt continuance, that he is adminiſtrator. The law is, that where there is a meddling as *executor de ſon tort*, adminiſtration afterwards granted purges that *tort*; as in *Payn's Caſe* (*g*). It is true, that a ſubſequent adminiſtration ſhall not abate the plaintiff's ſuit, becauſe he could not call him by any

(*a*) 1. Roll. Abr. 922. 1. Brownl. 73.

(*b*) 1. Mod. 208. 2. Mod. 51.

(*c*) Stiles, 337.

(*d*) 2. Roll. Abr. 539.

(*e*) Cro. Eliz. 49.

(*f*) Salk. 178.

(*g*) Stiles, 337.

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other name than executor; but it enables the party to retain. The difficulty is, Whether the defendant's plea is not ſuch an admiſſion of his being executor as to prevent his plea of adminiſtratorſhip, as inconſiſtent? And it does not ſeem to me to be inconſiſtent; for the plea in this caſe muſt be taken in the ſame ſenſe with the declaration. I know no rule in law that pleading matter after the laſt continuance is a waiver, unleſs it is other matter, as in the caſe of *Barber v. Palmer*, in *Salk.* which was a different defence. *Hob.* 81. is denied in *Salk.* Theſe were pleas inconſiſtent with each other, which the preſent caſe is not, for there ſeems to me no inconſiſtency in it, or what amounts to a waiver. There is an objection, that the plaintiff is deprived of the benefit of controverting this judgment; but there appears to me no default in the defendant, for the plaintiff before his reply might have traverſed the judgment, if he had thought fit. And I do not ſee what other method the defendant could have taken. But before I give my opinion, I ſhould be glad to look a little into the authorities, a great number of which have been cited in this caſe.

PAGE, *Juſtice.* I do not think it a waiver in this caſe, the ſubſtance being the ſame; it is only a continuation of the ſame defence. The tortious executorſhip is purged by the adminiſtration; and, as I take the matter at preſent, I think it is well enough: but I deſire to conſider further of it.

PROBYN, *Juſtice.* The plaintiff might have replied in this caſe, that the judgment was by fraud, that there were aſſets *ultra*; but he makes another caſe, and puts the defendant under a neceſſity of ſupporting his plea; in which he has only ſet the whole of the caſe before the Court; and that amounts but to one defence. If it had been a difference from the firſt, and inconſiſtent with the plea, it had been ill; but I think it very conſiſtent; and the plaintiff himſelf has put his caſe upon the rightful executorſhip. This cannot be ſaid to be the defendant's *laches*, for adminiſtration may be diſputed; and it is not to be obtained immediately upon application. The next queſtion is, Whether this is a departure? I rather think it a confirmation of the plea. I incline to think, the plaintiff might take iſſue upon the whole of this, as it makes but one defence. The caſes ſeem, upon theſe principles, to be well reconciled. But if my Lord pleaſes, we will look further into the caſes; though there ſeems to me to be no great doubt.

CHAPPLE, *Juſtice.* The grant of adminiſtration is the act of the ordinary, and ſometimes takes up a great deal of time; ſo that there appears no *laches* in the defendant. There ſeems to me to be no waiver or departure from the matter of defence. The defendant admits his executorſhip according to the plaintiff's declaration, and does not directly admit that he has proved the will, &c. which would be another conſideration if he had. Adminiſtration relates to the inteſtate's death, and purges the precedent wrongful executorſhip, though adminiſtration *pendente lite* will not abate the plaintiff's writ. *Styles*, 337. 1. *Roll. Abr.* 923. *Sid.* 76. 1. *Keb.* 285. This is no departure or waiver of the bar, but a defence of it. Where the plaintiff replies that the defendant is executor of his own wrong, ſhall he be prevented from defending himſelf? And it would be hard that the defendant ſhould not have his judgment in this caſe.

Lee, *Chief Juſtice*. Upon the whole of this record there appears no title for the plaintiff. Let there be judgment for the defendant, unleſs cauſe be ſhewn before the end of Term.

N. B. The plaintiff did not think proper to ſhew cauſe.

The King *againſt* Gardner.

Caſe 272.

THE DEFENDANT was convicted before a juſtice of the peace upon the ſtatute 5. *Anne*, c. 14. for that he kept a gun contrary to the ſtatute, being an engine to deſtroy game; which charge the defendant confeſſed before the ſaid juſtice of the peace. And exceptions being taken to this conviction,

Strange, *Solicitor General*, for the plaintiff, ſtrongly inſiſted upon the defendant's confeſſion; and argued, that the keeping a gun to kill game was within the ſtatute; and that the words of the act (ſect. 4.) being in the disjunctive, "keep or uſe," the doing either one or the other was a ſufficient offence within the ſtatute.

A penal information on 5. *Anne*, c. 14. charging that the defendant "kept a gun "contrary to "the ſtatute, "being an inſtrument to "deſtroy "game," is not maintainable, although the conviction ſtate that the defendant confeſſed the charge.

Dennison *for the defendant* excepted againſt the conviction, and inſiſted, that the charge againſt the defendant being inſufficient, his confeſſion of it muſt be ſo too: that the charge in this conviction is no offence againſt that act, or any other, *viz.* that he kept a gun, being an engine to deſtroy game; and therefore it might as well have been ſaid, he kept a cane contrary to the ſtatute, being an engine to deſtroy game; for it does not appear that he actually did kill any game. And to charge only that he kept a gun is improper, for it includes every man that keeps a gun. And the conviction only ſaying, that he kept a gun contrary to the ſtatute, being an engine to deſtroy game, theſe latter words are but in the nature of a deſcription, and limit the former ones to thoſe only who make that uſe of it: that a gun is not properly an engine to deſtroy game, unleſs it is put to that uſe, but it is for the defence of a man's houſe, as well as a ſword, which might perhaps be applied to deſtroy game. The ſtatute 22. & 23. *Car.* 2. c. 25. does not mention guns, but that word is properly omitted in the ſtatute 5. *Anne*, c. 14.; for this act can only mean ſuch inſtruments as are merely applicable to deſtroy game, as ſnares, &c.; otherwiſe any man who has a gun may undergo the ſame conviction.

S. C. 2. Seſſ. Caſes, 385.
S. C. 2. Stra. 1098.
S. C. And. 255.

Lee, *Chief Juſtice*. There is great weight in the objection to this conviction. The word "gun" is omitted in the fourth clauſe of this ſtatute of 5. *Anne*, c. 14.; and the general words of this act are not extenſive enough to take in every inſtrument for the deſtruction of game, but ſuch only as is expreſsly uſed for and applicable to the deſtruction of game, and perhaps to no other purpoſe. And they do not extend to prohibit a man from keeping a gun for his neceſſary defence, but only from making that forbidden uſe of it. And the word "gun" being purpoſely omitted in this act, the defendant is not within the penalty.

PAGE, *Juſtice*, of the ſame opinion.

PROBYN, *Juſtice*. The objection that the defendant has confeſſed this charge has been well anſwered, for the confeſſion can be carried no farther than the charge itſelf, and that being inſufficient the conviction ought to be quaſhed. The engines prohibited by this act muſt be ſuch as are kept on purpoſe to deſtroy game; and it muſt appear by evidence that they have been ſo uſed, to bring the offence within the ſtatute 5. *Anne*, in which the Legiſlature did purpoſely omit the word "gun," becauſe farmers are generally obliged to keep a gun, and are no more within the act for doing ſo than they are for keeping a cabbage-net: the conviction ought to be quaſhed.

CHAPPLE, *Juſtice*, of the ſame opinion; and that the reaſon the words of the act are in the disjunctive, "keeping or uſing, "&c." is, becauſe people uſe other folks dogs; and if they do, they are within the act. And the keeping of them muſt be averred to be on purpoſe only to deſtroy the game.

LEE, *Chief Juſtice*. The conviction muſt be quaſhed *(a)*.

(*a*) See Rex *v.* Filer, 1. Stra. 496. Wingfield *v.* Stratford, Sayer, 15. S. C. 3. Wilſ. 315. Rex *v.* Hunt, Dougl. 683. Avery *v.* Hoole, Cowp. 825. Rex *v.* Hartley, Cald. 175. Rex *v.* Thompſon, 2. Term Rep. 18.

Caſe 273. The King *againſt* Morgan Edwards, Eſq. High Sheriff of Montgomery.

An information prayed againſt the ſheriff of *Montgomery*, for refuſing, after notice, to keep his priſoners in *the New Gaol*; but the information was refuſed.

ON MOTION to make abſolute a rule for an information againſt the defendant for a miſdemeanor, in not keeping his priſoners in a new gaol built in the town of *Montgomery*, though he had notice from the juſtices that it was fit, and for keeping the priſoners committed to his cuſtody in a houſe he hired for that purpoſe;

SIR THOMAS ABNEY, MR. SOLICITOR GENERAL, and MR. HALLINGS, *in ſupport of the information*, inſiſted, that the ſtatute 11. & 12. *Will.* 3. had been well purſued by the juſtices; that THE GRAND JURY of ſeſſions and at aſſizes are impowered thereby to make preſentments relating to gaols, &c.; and that the ſtatute of *Henry the Eighth* had made *Montgomery* a county town: that this new gaol has been built a year and a half: that by the common law felons are to be kept in the county gaol, where there is one, "in the common county gaol" by the ſtatute 5. *Hen.* 4. c. 10. which, according to my *Lord Coke*, is but declarative of the common law: that

The King *againſt* **Morgan Edwards, Esq; High Sheriff of Montgomery.**

that by the ſtatute 11. & 12. *Will.* 3. felons ſhall not be impriſoned but in the common county gaols; and 6. *Geo.* 1. c. 19. has made that perpetual, and has enlarged the power of the juſtices: that the key of this new gaol had been properly tendered to the ſheriff by order of the juſtices: that the only way in which they could proceed in this caſe was by application to this Court: that they had acted only conformable to act of parliament, that ſheriffs are bound by law to take notice of common county gaols. The juſtices ſay that this gaol is fitting, though thoſe who are not judges may ſay otherwiſe. It is ſworn, that the place in which the ſheriff kept the priſoners is an improper one, and juſtices can only commit to the public county gaol.

To which *it was anſwered*, by Hayward, *Serjeant*, Wilbraham, and Taylor, That the defendant denies by affidavit that the houſe is hired, or any rent paid for it: that the ſtatute of 11. & 12. *Will.* 3. is, that in caſe the common gaol is inſufficient, upon a preſentment by the grand jury, there ariſes a juriſdiction to the juſtices. Here they have not produced any preſentment, orders, &c. to prove a proper juriſdiction; neither do they ſo much as ſhew that the old gaol is not ſufficient, or that the new one is a public county gaol: that by the 14. *Edw.* 3. c. 10. ſheriffs have the cuſtody of gaols; and being anſwerable for their priſoners, may keep debtors where they pleaſe: that it does not appear what authority the perſon had who tendered the key to the defendant; that the place where the defendant now keeps his priſoners is a uſual and commodious place: that this new gaol did not appear to be ſufficient to hold and keep the priſoners, but that it was ſo damp in the plaiſtering, &c. that it would have been murder to have removed them to it: that the water comes into this new place, and the walls of it are ſuch that the priſoners may eaſily eſcape: and ſo the ſheriff might have been cenſured, as others have been, if he had removed them thither: and that this is an improper application, becauſe the Court will not try a right in a criminal way.

Lee, *Chief Juſtice*. There is no act of parliament which appoints committing to *the county gaol*, but only to *the common gaol*. By the 11. & 12. *Will.* 3. power is given to juſtices relating to gaols upon preſentments. It does not appear to be a gaol within this ſtatute, for the preſentment is not before us. And though ſome affidavits ſay there is no common gaol, yet it appears there is one uſed as the common gaol of the county; and you muſt therefore ſhew this to be ſuch a gaol as the ſheriff is obliged to carry felons to, in which you have failed. If you had purſued the ſtatute ſtrictly, to be ſure, the ſheriff muſt have by law carried his priſoners to it: and then he is within the juriſdiction and order of the juſtices. But upon the whole, I do not think this ſuch a caſe as we ought to proceed upon by information.

Page, *Juſtice*, of the ſame opinion. *Quære.*

THE KING *againſt* MORGAN EDWARDS, ESQ. HIGH SHERIFF OF MONTGOMERY.

PROBYN, *Juſtice.* The rule ought to be diſcharged. There ought to have been a preſentment. There was no gaol, or if there was it was inconvenient. Sixty years uſe of a houſe for a priſon, as in this caſe, was ſufficient to nominate it a county gaol. The court of grand ſeſſions having a juriſdiction, application may be made there; which is a further reaſon for diſcharging this rule.

CHAPPLE, *Juſtice*, of the ſame opinion.

Caſe 274. Thruſtout *againſt* Grey.

Quære, Whether the king can licenſe one perſon to build *a lighthouſe* on another's ſoil; OR if a perſon erect *a lighthouſe* on his own ſoil, it is a ceſſion of the land to the crown.

IN AN EJECTMENT brought for certain cottages, otherwiſe lighthouſes, in *Wintertoun*, in *Norfolk*, THE JURY found a ſpecial verdict, containing the ſeveral patents under which the ſaid lighthouſes were erected, &c.

Two queſtions aroſe on this ſpecial verdict.

FIRST, Whether the prerogative of the crown extends to licenſe a perſon to build a lighthouſe on another's ſoil without the owner's conſent (*a*)?

SECONDLY, Whether the grantee of a licence to erect lighthouſes does, by building one upon his own ground, make a ceſſion of the land to the crown?

CLARKE *for the plaintiff* argued, that the prerogative does not extend to licenſe a man to build on another's ground. Beacons, indeed, cannot be erected without the king's licence (*b*); and at common law, none but the king may erect ſea-marks (*c*). But there is only one inſtance of a general power to build ſea-marks,

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(*a*) *Quære*, Whether the king can grant to another power to erect lighthouſes, &c. upon my ground, or build one there himſelf, without my conſent? See 1. Inſt. 148. verſ. fin. 3. Inſt. 204. b. Grotius, lib. 2. c. 3. ſ. 14. Molloy, lib. 2. c. 16. ſ. 5. 2. Roll. Abr. 171 (E.). pl. 4. 3. Br. tit. pl. 12. Moor, 474. Huddy *v.* Wellhouſe. Cro. Eliz. 462, 463. F. N. B. 225. E. 12. Co. 13. Bro. tit. Patents, pl. 111. 2. Roll. Abr. 187. 12. Co. 12. 2. Roll. Abr. 164. pl. 16. 11. Co. 86. 13. *Hen.* 8. 26. a. Hale's H. P. Cor. 1 vol. 56. Raym. 448. Caſe of the Town of Winchelſea, Plowd. Com. 313. 336. 12. Co. 12, 13. Childs *v.* Sans, in Saund. 297. Lutw. 353. 3. Lev. 160. Dyer, 60. b. The Corporation of Trinity Houſe *v.* Richard Bowater. The Caſe of the Corporation of Trinity Houſe, 1719, by Lord Cowper. The Corporation of Trinity Houſe *v.* Sir Malthus Ryals, 1725, in the Houſe of Lords. 4. Inſt. 145. Davis, 12. Lit. ſect. 374. Cro. Jac. 340. 399. 521. 2. Keb. 114. Gibbs *v.* Hoſkinſon, Dyer, 60. Br. Covenant, 2. 2. Roll. Abr. 288. pl. 2. 285. pl. 82. Patents to erect lighthouſes on another's ſoil upon record at the Rolls, 28. *Hen.* 8. 13. *Jac.* 1. Dungeneſs Lighthouſe to Howard, 11. *Car.* 1. Dungeneſs Lights to Bullock, 12. *Car.* 1. Three Lights to 12. *Car.* 2. Dungeneſs Lights to Shipman, 23. *Car.* 2. Three Lights to Smith, 30. *Car.* 2. A Lighthouſe on Sir Edward Turner's Ground to Trinity Houſe. F. N. B. 222. A.—NOTE *to MS.*

(*b*) 3. Inſt. 204.

(*c*) 4. Inſt. 148.

and that could be given only by parliaments (*a*). In *Eaſter Term*, in the firſt year of *James the Firſt*, it was reſolved, by the two Chief Juſtices, the Attorney and Solicitor General, that the ſtatute of *Elizabeth* was a general law, extending to all light-houſes. In this caſe there ought to have iſſued an *ad quod damnum* (*b*). The preſent queſtion will receive a great light from the general laws of nations, wherein the *publica utilitas* is not underſtood to mean anything lucrative, or to increaſe the public coffers or treaſures, which would make property precarious; but he who loſes his property for the public ſafety or ſervice ought to be ſatisfied for it (*c*). *Grotius* (*d*) ſays, that loſſes for the public good ought to be equal. *Puffendorff* (*e*), who wrote about fifty years after *Grotius*, ſpeaking of the ſovereign power over eſtates, ſums up all *Grotius*'s arguments into one chapter: and our laws agree with theſe general reaſons. In the caſe of the prerogative of the crown in digging ſalt-petre (*f*) it is ſaid, that the inheritance muſt be left as it was found; that what is done out of neceſſity ought to be repaired; and that it is but a purveyance, and is not to be granted (*g*). In 1. *Hale's H. P. Cor.* 56. there is a record of a caſe where a county ranſomed themſelves from the king's enemies for their common welfare, but the party who paid the fine was recompenſed for it (*h*). This prerogative can hurt no man's inheritance. The neceſſity which gives the crown a prerogative in the ſubjects property muſt not be for the convenience of a particular part of the ſubjects, as in this caſe, or for profit to the crown, but to obviate general dangers, and then the owner ought to be ſatisfied. Secondly, The caſes where a man by opening a road or ſtreet in his own ground, or uſing his chapel as a pariſh-church, is ſaid thereby to have given them to the public (*i*), are inſtances wholly of a public nature; and making ſuch a ſtreet is for the benefit of the party, being for the eaſement of his own tenants; but no ſuch covenant is implied in the preſent caſe. In *Cro. Jac.* 240. it is ſaid, that the patentee, when he takes by the patent, conſents to all that is therein, which ſhall be taken and interpreted as a covenant on his part; yet that will not reach the preſent caſe, for here the grantee is bound no longer than during the term, and the covenants extend no farther; and therefore, upon the expiration of the term in the grant, the land continued the owner's. In theſe patents, wherever the ſoil is in the crown it is always granted, and where it is the owner's it is taken notice of. In the ſeventeenth year of *Charles the Second*, *Tinmouth Lighthouſe* was granted to *Edward Villers*, and the crown granted the ſoil. In

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(*a*) 8. *Eliz.* Co. 13.

(*b*) 2. *Edw.* 3. 7, 8.

(*c*) Grotius de Jure Belli et Pacis, lib. 1. c. 1. ſect. 6. lib. 2. cap. 14. ſect. 7. lib. 3. cap. 19. ſect. 7. lib. 3. cap. 20. ſect. 7. De Fide Publica qua Bellum finitur.

(*d*) Gro. de Jure, ſect. 8.

(*e*) In lib. 8. c. 5. ſ. 3. ſ. 7. lib. 3. De Jure Naturali et Gentium.

(*f*) 12. Co. 12.

(*g*) 2. Roll. Abr. 178. pl. 10.—See alſo the Caſe of Mines, in Plowden's Commentaries.

(*h*) 2. Inſt. 63.

(*i*) 2. Roll. Abr. 288.

the twenty-eighth year of *Charles the Second*, the patent of *Spurnepoint Lighthouſe*, at the mouth of the *Humber*, was granted to *Juſtinian Angell*, the proprietor of the ground. And they cannot grant a toll but upon equal terms, as where a benefit ariſes from it to thoſe who pay (*a*). The caſe of *Gibbs v. Oſbaſton*, where it is ſaid, that an ejectment will not lie for a lighthouſe built in a different place from that where the former ſtood, ſeems, from the record, to be but a *dictum* of *Mr. Keble*, and proves nothing but that there is ſcarcely a caſe in that author which can be depended upon.

Bootle *for the defendant*. This ejectment is not maintainable. There is a ceſſion of the land to the crown, which for the public benefit is conſidered as an extinguiſhment of right. Lighthouſes, *ignes monitorii*, &c. are ſet up by the crown only, and can be erected by no other authority; therefore the property in them muſt neceſſarily be in the crown (*b*). After the term compriſed in the patent is expired, the crown takes the land as a reverſioner; like the caſe where a tenant fixes coppers, &c. to the freehold, which is deemed a gift in law to the reverſioner (*c*); for though they might be removed during the term, yet if they are continued there after the term, they become a gift in law to him in reverſion, and are not removeable. So if the leſſee builds a new houſe on the land demiſed, the leſſor may bring an action of waſte againſt him for letting it go out of repair (*d*). Upon an equal claim of right, the crown has the preference (*e*). This is as much a gift of the ground to the king as building a ſtreet is a gift of it to the public; and there is no difference. The *Caſe of Mines* (*f*) was ſo adjudged, upon the reaſon of it being for the public good of the realm; and ballaſt may be dug in another's ſoil, it being *pro bono publico*. A tax may be laid upon perſons obliged to repair beacons before they want it (*g*). By the civil law, property may paſs without ſolemn act, where the caſe is of a public nature. By the common law, property may paſs without the ordinary ceremonies of feoffment, livery, &c. as by exchange, extinguiſhment, ceſſion, or dereliction of right. An exchange of lands in the ſame county may be without deed (*h*). If an infant exchange lands, and after his full age occupy the land taken in exchange, that perfects it; for it was not void at firſt, becauſe it amounted to a livery (*i*). An exchange in the king is good, though he is ſeiſed in his public capacity, and the ſubject in his natural capacity (*k*).

This cauſe was again adjourned (*l*), and argued as follows in *Trinity Term* 1740.

(*a*) Bro. Abr. "Toll."

(*b*) 4. Inſt. 148.

(*c*) Poole's Caſe, 1. Salk. 368.

(*d*) Lord Darcy *v.* Aſkwith, Hob. 234.

(*e*) Woodward *v.* Fox, 2. Vent. 267.

(*f*) Plowd. 313. 336.—See 12. Co. 13.

(*g*) Raym. 448. Caſe of Winchelſea.

(*h*) Co. Lit. 51. 1. Roll Abr. 814.

(*i*) 1. Roll. Abr. 815. pl. 4.

(*k*) Co. Lit. 51.

(*l*) It came on originally in Hilary Term 1738, when it was adjourned to the preſent time.

On

Thrustout *againſt* Grey.

On a ſpecial verdict in ejectment the general queſtion was ſtated to be, Whether the acceptance of letters-patents to create a lighthouſe gives the reverſion of the ſoil to the crown?

Proctor *for the plaintiff* inſiſted, that the ſoil continued in the owner, becauſe it is a maxim, that *Cujus eſt ſolum ejus eſt uſque ad cœlum*; and although no lighthouſe ſhall be erected without the king's licence (*a*), it does not follow from thence that he may erect them wherever he will. The king's licence is only to do that which cannot be done without; and if that licence be but for years, there is no reaſon why the land ſhould paſs for ever. Fairs, markets, rivers, ferries, &c. are for the benefit of the public, and yet a grant of theſe to another's prejudice is void. The *Caſe of Mines* was cited on the other ſide from *Plowden*; but the reaſons there given do not extend to this caſe: for lighthouſes may as well help our enemies as the ſubject, but beacons are for the defence of the whole realm. So is digging ſalt-petre, which muſt alſo be done in that way which is leaſt prejudicial to the ſubject. The king may lay embargoes (*b*), but they are for the defence of the realm, and the ſubject's property is not to be prejudiced (*c*). The king cannot give me power to ouſt another of his land (*d*). In *Darcy v. Aſkwith* (*e*) it is ſaid, that anything eſſential to a grant ſhall paſs as incident; but that is not applicable to this queſtion. When theſe erections ceaſed to be lighthouſes, they ought to be conſidered as buildings, and the owner may uſe them as ſuch, though not as lighthouſes. The caſe of *Woodward v. Fox* (*f*), concerning the king's prerogative *in bonis nullius*, is not applicable to this matter; but *Gibbs v. Oſbaſton* (*g*) is with us. A diſpenſation-licence paſſes no intereſt, but only makes that lawful which would not be ſo without (*h*). And this licence has its effect for the time, which is the lawful operation of it. And this prerogative is not to be erected for the benefit of a part of the kingdom, but it muſt be for the defence of the whole nation in general.

Floyd *for the defendant.* It muſt be granted to us, that the whole ought to be preferred to a part, and that property is ſacred until the public uſe requires it; which is the original compact upon which property ſubſiſts: and then property is not taken away, but ceaſes; and yet *Cujus eſt ſolum ejus eſt uſque ad cœlum*. In 4. *Inſt.* 151. there is a commiſſion to erect firebores, &c. and to levy a toll for ſupporting the ſame. Fairs, markets, ferries, &c. are rather eaſements than anything elſe; but lighthouſes are of neceſſity. And as to their being liable to be made uſe of by our enemies, our ſhips, &c. may be made uſe of by our enemies, if taken by them; and therefore that can be no argument againſt them. Ceſſion to the public, as ſtated in *Puffendorff de Uſu Captione*, is not unknown to our laws; as in the caſe of letting out a ſtreet to

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(*a*) 3. Inſt. 204. 4. Inſt. 148.
(*b*) Carth.
(*c*) Plowd. 236. Moor, 671.
(*d*) Roll. Abr. 164.
(*e*) Hob. 234. S. C. Hutt. 19.
(*f*) 2. Vent. 267.
(*g*) 2. Keb. 115.
(*h*) Vaugh. 329.

THRUSTOUT *againſt* GREY.

the public, which cannot be reſumed (*a*). So of a man's private chapel (*b*). So in equity, if a man ſee another build on his ground, and ſay nothing againſt it, he ſhall not be ſuffered to pull it down again. And this erection under the grant is either a gift or an exchange of the ſoil; and therefore judgment ought to be given for the plaintiff.

PAGE, *Juſtice*, being abſent, this was ordered to ſtand over for judgment till next Term.

Adjourned.

(*a*) 6. Mod. 307. 2. Inſt. 701. (*b*) 2. Roll. Abr. 288.

Caſe 275. The King *againſt* Wyvill and Others.

An information granted againſt copyholders for a riot in pulling down incloſures on a claim of common; they having neglected to try their right to common purſuant to a rule of court.

THE DEFENDANTS were copyholders who claimed a right of common to be taken in the fields after harveſt till the land is ſowed again, &c. except in their own grounds. Being kept out by incloſures, they aſſembled together, and began to pull down the fences. Upon being forbid to proceed from pulling down any more they deſiſted, but ſoon after returned again, and in all pulled down two hundred and ninety rods of incloſure; for which they were now to ſhew cauſe why AN INFORMATION ſhould not be granted againſt them for *a riot*.

1. Roll. Abr. 406.
Bridg. 10.
2. Inſt. 88.
Comy. 341.
1. Burr. 265.
2. Term Rep. 391.

IT WAS ARGUED *for the defendants*, that this caſe being a matter of private right ought not to be tried by a criminal proceeding, as an information (*a*). And it was compared to the common of *Strack*, in *Sir Miles Corbett's Caſe* (*b*).

IT WAS INSISTED *for the king*, that commoners could not, under a pretence of right, juſtify acts of violence and injuſtice; for where they are injured, the law has provided a remedy for them (*c*); and therefore if commoners break down hedges or pales, or throw down ditches, they are rioters (*d*).

LEE, *Chief Juſtice*. The rule was for the defendants to ſhew cauſe why AN INFORMATION ſhould not go againſt them for a riot. The time when theſe incloſures were made does not appear. There ſeems to be a confeſſion of right of common in them, *viz.* that the freeholders, &c. have a right of common between the reaping and ſowing the fields, except in their own grounds. I cannot interpret this to be a common *pur cauſe de vicinage*. There is no warrant for that opinion. Where the Court ſees a doubt whether the party who has done the act has a right, to prevent the trial of it there ſhould be ſomething ſhewn very ſtrong. In this caſe I ſeem inclined to the right of the copyholders. If a man having a right of common is excluded by erections, he may have a ſpecial action

on

(*a*) Rex *v.* Rhodes. The Caſe of the Mayor of Hampſtead.

(*b*) 7. Co. 5.

(*c*) 1. Roll. Abr. 405.

(*d*) 3. Inſt. 176.

The King *againſt* Wyvile and Others.

on the caſe againſt the lord, ſetting forth that he could not thereby enjoy his common in ſo full a manner as he ſhould. And an information for a riot in removing hedges by copyholders, &c. was denied ſince I ſat here, there being a claim of a right, and no greater force, &c. uſed than was neceſſary to remove them. And when it appears that the party had no right, then he muſt anſwer it. Therefore I think this rule ought to be enlarged, until it appear what right the copyholders had to remove theſe fences, agreeable to the common practice; and this matter being tried in a civil way, you may apply again to the Court.

Mr. Serjeant Eyre propoſed, that the rule ſhould be enlarged by conſent.

Page, *Juſtice*, who aſſented to this propoſal, cited *Burnet* v. *Sir Robert Barnell.*

Probyn, *Juſtice*, of the ſame opinion. If the incloſures were made before the tenant came in, it is more inexcuſable to pull them down than if erected afterwards and newly erected. Here are two hundred and ninety rods of fences thrown down, though there were ſufficient gaps for them. Where copyholders aſſert their right in this manner, and being forbid, as in the preſent caſe, return again, it is an illegal method of aſſerting a civil right, and ſeems to me an act of force (*a*). In the caſes put, there was no more done than was neceſſary; and I agree to them. In the caſe of *Whaddon Chaſe*, all the parties were tenants, and the information was granted. And the manner of acting in this caſe diſtinguiſhes it from thoſe put. But if you will try this civil right, I am for enlarging the rule; but it muſt be done within a certain time.

Chapple, *Juſtice*, abſent in the Duchy-court.

Page, *Juſtice*. Let them agree in trying this. I do not think their being forbid ſignifies anything.

The rule for the information having been enlarged upon terms, namely, that the copyholders ſhould try their right the following aſſizes, was, in *Michaelmas* 1739, made abſolute, they not having proceeded to trial purſuant to the rule.

(*a*) The diſtinction ſeems to be this; If the lord of the manor make a hedge round the common, or do any other act that entirely excludes the commoner from exerciſing his right, the latter may do whatever is neceſſary to let himſelf into the common; but if the commoner can get at the common and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that caſe his remedy is by *action on the caſe*, or by *an aſſiſe*, and he cannot aſſert his right by any act of his own. *Per* Lord Kenyon, Sadgrove *v* Kerby, 6. Term Rep. 485. See alſo Maſon *v.* Ceſar, 2. Mod. Rep. 65. and Cooper *v.* Marſhall, 1. Burr. 265.

The King *againſt* Harman. Caſe 276.

A *certiorari* lies to remove an appointment of overſeers before appeal.

The question was, Whether a *certiorari* ſhould be granted to remove orders of juſtices before an appeal to their ſeſſions?

THE KING *against* HARMAN.

LEE, *Chief Juſtice.* No doubt but a *certiorari* lies from this Court to remove orders of juſtices, notwithſtanding the ſtatute gives an appeal to the ſeſſions, which privilege of appeal does not take away the juriſdiction of the Court in this point. The queſtion then is, Whether this Court has made any rule to make it irregular to grant a *certiorari* before an appeal firſt made and determined? That rule in *Salk.* 147. relates only to caſes where a certain time of appeal is fixed. But ſuppoſe this rule were general, it may be diſpenſed with for the benefit of the party who has the privilege of appeal, as this caſe is. Though thouſands of orders of appointment have been removed here before any appeal, yet I do not deny but there is an appeal given by the ſtatute; but he for whoſe benefit it is may waive it. After appeal, indeed, the Court will not remove orders by *certiorari* till the judgment of the ſeſſions has been given thereon. The rule to ſuperſede the *certiorari* muſt be diſcharged.

Caſe 277.

The Sheriff of Hampſhire *againſt* Godfrey.

Upon a motion for an attachment againſt a defendant for an eſcape, if it be ſworn that he was *lawfully arreſted*, it ſhall be preſumed to have been accompanied with all the circumſtances which the law requires to conſtitute an *arreſt*.

THE PLAINTIFF arreſted the defendant *Godfrey* in the county of *Hampſhire*, who deſired leave to go to the next *houſe*, which happened to be in the juriſdiction of the town and county of *Southampton*. He by that means made his eſcape. Upon all this appearing upon affidavit,

THE SOLICITOR GENERAL moved the Court to make the rule for an attachment againſt the defendant abſolute.

DRAPER, *Serjeant*, *for the defendant*, inſiſted, that it was not ſufficient to ſay that the defendant was arreſted, for that there can be no arreſt without an actual touching (*a*).

MR. SOLICITOR GENERAL *contra*, that the rule ought to be made abſolute; that breaking into a room charged with a legal writ againſt a perſon is an arreſt, though he eſcape out of the window. Submiſſion to proceſs is an arreſt (*b*); and a reſcue may be returned upon *meſne proceſs*, but not upon *execution*, becauſe in the firſt caſe he cannot raiſe the *poſſe*, as he may in the other caſe (*c*).

LEE, *Chief Juſtice.* When officers ſwear that they have arreſted a perſon, it ſhall be ſuppoſed that they obſerved all the circumſtances; though a man is not touched, yet if he know there is a proceſs againſt him, and ſubmit to it, it is an arreſt. The caſe of *Genner v. Sparkes* is good law, for there the man endeavoured to avoid the arreſt, and did not ſubmit to it. If bailiffs permit a man to go to a public-houſe, and he gets into another juriſdiction, it is a fraud and a reſcue in thoſe who aſſiſt him. It is a rule of this court,

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(*a*) Genner *v.* Sparkes, 1. Salk. 79. S. C. 6. Mod. 173

(*b*) See Hornet *v.* Batten, Bull. N. P. 62. Blatch *v.* Archer, Cowp. 64.

(*c*) See 6. Mod. 141.

The Sheriff of Hampſhire *againſt* Godfrey.

that you cannot apply for an attachment until a reſcue is returned, where it may be returned, as in caſe of *meſne proceſs*; otherwiſe where a reſcue cannot be returned, as upon an execution.

Page, *Juſtice*, abſent, *propter ægritudinem*.

Probyn, *Juſtice*. As an arreſt cannot be made without laying hands, where an arreſt is ſworn, it muſt be ſuppoſed the hands were laid upon the perſon arreſted. If no hands are laid upon a man, but his horſe is ſtopped, and he prays to go to a houſe to make it up, it is a ſubmiſſion to the proceſs; and if he go into another juriſdiction, it is a fraud. If a man run out of cuſtody into another county, they may purſue and retake him.

Chapple, *Juſtice*, of the ſame opinion.

Lee, *Chief Juſtice*. Upon a reſcue, the uſual practice is to grant an attachment (*a*).

The rule for attachment muſt be made abſolute.

Probyn, *Juſtice*, ſaid, that officers who give ſecurity to the ſheriff cannot be witneſſes either for or againſt him, becauſe they are parties in intereſt.

(*a*) Rex *v.* Belt, 2. Salk. 586.

EASTER TERM,

The Twelfth of George the Second,

IN

The Common Pleas.

Sir John Willes, *Knt. Chief Juſtice.*

Sir Alexander Denton, *Knt.*
Sir John Forteſcue Aland, *Knt.*
Sir William Forteſcue, *Knt.* } *Juſtices.*

Dudley Ryder, *Eſq. Attorney General.*
John Strange, *Eſq. Solicitor General.*

Waring *againſt* Bletchington. Caſe 278.

RULE *niſi* to amend a judgment entered on the roll in a ſubſequent Term to that in which judgment was entered: the amendment deſired was, to inſert "*do recover*" inſtead of "*ought to recover,*" which is uncertain, and not a judgment to recover.

Judgment amended by inſerting "*do recover*" inſtead of "*ought to recover.*"

IT WAS SAID *againſt the amendment*, that it is an error in law and not the miſpriſion of a clerk, and therefore ought not to be amended in a ſubſequent Term, the Court having no ſuch power. Caſes cited againſt the amendment were, *Blackmore's Caſe*, 8. *Co.* 156. *Cro. Eliz.* 497. *Palmer*, 198. 259. 1. *Roll. Abr.* 201. 1. *Brownl.* 56. 1. *Lev.* 430. 5. *Mod.* 147.

1. Roll. Abr. 201.
Stra. 869.
Ld. Ray. 1570.
Dougl. 116.
1. Vent. 132.
1. Com. Dig. "Amendment" (R.).

CONTRA, *in ſupport of the amendment*, the caſes cited were 1. *Vent.* 132. *Eaſter Term*, 10. *Geo.* 2. *Forſter v. Blackwell*, where the amendment was exactly in the ſame words. *Hob.* 327. *Cro. Jac.* 603. 2. *Leon.* 1, 2. *Cro. Eliz.* 203. *Stiles*, 265. 1. *Roll. Abr.* 751. 1. *Sid.* 70.

THE COURT were all of opinion that the amendment ſhould be made, for as the words now are it is no judgment of the Court, but a mere nullity; that the ſtatute 16. & 17. *Car.* 2. warrants it; for though it do not fall within the inſtances there given, yet it is a miſtake of the like nature.

Caſe 279.

Colthurſt *againſt* Colthurſt.

In what caſe pleading muſt conclude *to the country.*

DEBT ON AN ARBITRATION BOND. The defendant pleads "no award." The plaintiff replied, that the arbitrators made an award, by word of mouth, that the defendant ſhould pay the plaintiff two hundred and ſixty-four pounds, and that the plaintiff demanded that ſum, and the defendant refuſed, &c. The defendant rejoined, that the arbitrators refuſed the charge of the award, and traverſed the award by word of mouth. To which the plaintiff demurs.

The rejoinder is only an inducement and the ſame as the traverſe, and would put the plaintiff to an unneceſſary ſur-rejoinder; that they did award by word of mouth: and *Cro. Eliz.* 754. 2. *Salk.* 583. *Co. Lit.* 126. *a.* *Yelv.* 137. were cited.

WILLES, *Chief Juſtice.* In all facts where a ſingle point is put in iſſue, the party ought to conclude to *the country.* If iſſue be joined a traverſe muſt neceſſarily be a denial, for no iſſue can be joined without a negative and an affirmative; and therefore the defendant ſhould conclude *to the country*, and not by averment; and gave

Judgment againſt the defendant.

Caſe 280.

Marriott *againſt* Thompſon.

Quære, Whether a widow, as adminiſtratrix of her deceaſed huſband, can retain, on a bond given to her *dum ſola* conditioned to leave her ſo much money on his death, if the marriage took effect.

DEBT ON A BOND againſt the defendant as executrix of her huſband. She pleaded that her huſband, before marriage, was bound in an obligation, that if the marriage took effect, and ſhe ſurvived him, he would leave her four hundred pounds, otherwiſe the bond to be in force; that he died without leaving her any ſuch ſum, and made her his executrix; and that ſhe retained for the ſum in the bond; and that ſhe had no aſſets *ultra.*

IT WAS OBJECTED, that ſhe cannot plead a retainer on a bond given to another perſon, becauſe the reaſon of retainer is for want of a perſon againſt whom to bring the action.

Co. Lit. 264. 2. Bl. Rep. 965. 4. Term Rep. 640.

DRAPER, *Serjeant*, *contra.* The reaſon of retainer is becauſe the ſame hand is to pay and receive, and ſuch retainer is conſidered as a privilege and as a payment, as 2. *Roll. Abr.* 684. *pl.* 8. and *Grey v. Driſcall*, *Trinity Term*, in the tenth year of *George the Second*, adjudged, that a retainer may be given in evidence on a *plenè adminiſtravit*, becauſe the law changes the property of ſo much of the goods; and as the manner in which the four hundred pounds is to be paid is not ſet forth, it muſt be by executors; and in *Hob.* 127. *Noy*, 26. it is laid down that an executor may retain; and the teſtator, by making her executrix, ſeems to have intended to prevent the forfeiture of the bond; and if ſhe ſuffered the bond to be forfeited, it may be a *devaſtavit* in 1. *Vent.* 354.

MARRIOTT *against* THOMPSON.

PAGE and DENTON, *Juſtices.* An executor cannot retain for the penalty of a bond, becauſe the plaintiff may reply to the plea of the executor, that there is but ſo much due. And although it was objected that the penalty belongs to the obligee, and the wife has no remedy but in equity, yet it is laid down in *Dyer*, 2. *Moor*, 2. 1. *And.* 36. that an executor, who has no right of action, may yet retain; as where the executor pays money to the value of the goods; and the caſe of *Roſkelly v. Godolphin*, in *Raym.* 483. *Show.* 403. and *Skin.* 215. is in point, except the words "to leave "her" and "to pay her" make a different report. I allow retainer may be given in evidence, but it muſt be a debt which ſubſiſted and was due to the executor.

WILLES, *Chief Juſtice.* I took it that the method was, that the obligee ſhould bring an action and the executrix confeſs judgment to him, and he ſhould aſſign a judgment to her, and then ſhe may plead retainer. Equity is againſt the retainer, for in chancery they allow neither *merger* nor *retainer*, but both are at law on the foot of the rule of retainer, that ſhe may retain where ſhe cannot have an action, as where ſhe ſatisfies out of her own goods; and if ſhe may do this in the caſe of a ſtranger, why not in her own? and more it is ſo to do. The next enquiry is, if ſhe has pleaded as ſhe ought to do; for it ſhould be pleaded that it was in order to avoid the penalty of the bond; but ſhe has pleaded that no part of the bond is paid, which contradicts her retainer.

Adjournatur.

Grigg's Caſe.

Caſe 281.

On a covenant to levy a fine, the covenantor is not obliged to acknowledge a note of a fine for *other lands.*

A ENFEOFFS *B.* for a valuable conſideration, of lands in *Hilton*, in the pariſh of *Maſſum*, and covenants that he and his wife ſhall make further aſſurance to the fee. The feoffee enjoys the poſſeſſion for twenty-three years, and then ſends to the feoffor and his wife, deſiring they would acknowledge the note of a fine before commiſſioners of his lands in the pariſh of *Maſſum*, which the feoffor refuſed; on which an action was brought.

IT WAS OBJECTED, that the defendant ſhould not refuſe the note of a fine for containing more acres than he ought to paſs by the fine, becauſe the admeaſurement may not agree; as *Cro. Jac.* 251. 1. *Bulſt.* 90. *Moor*, 810.

DRAPER *contra.* That having more land in the pariſh than paſſed by the feoffment, he is not obliged to acknowledge that note; and the feoffor and his wife are excuſable, if any prejudice may ariſe from it: and though no more lands may paſs by the fine than are contained in the feoffment, yet the wife will be barred of her dower in the reſt; and cited 2. *Bulſt.* 317. 1. *Roll. Rep.* 103. 117.

Grigg's Case.

Willes, *Chief Juſtice.* This caſe does not depend on the authority of the caſes cited on either ſide. If on a covenant to levy a fine, the note of the fine with which the covenantor is ſerved contains a few more acres, it is no excuſe to refuſe it; but when the note contains other lands it is quite different; and the lands in the note, in the preſent caſe, are in another place than the lands in the feoffment are. There is no covenant on the wife's part, nor is ſhe obliged to bar herſelf of her dower. And the note does not ſpeak of *Hilton*, but the pariſh of *Maſſum.*

Fortescue Aland, *Juſtice*, ſaid the fines could enure to no other uſe but to bar her of her dower in the other lands. And for this laſt reaſon,

In *Trinity Term* following, judgment *niſi* being given this Term, was then confirmed.

TRINITY TERM,

The Thirteenth of George the Second,

IN

The Common Pleas.

Sir John Willes, *Knt. Chief Juſtice.*
Sir Alexander Denton, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir William Forteſcue, *Knt.*
Dudley Ryder, *Eſq. Attorney General.*
John Strange, *Eſq. Solicitor General.*

Down *againſt* Rowell.

Caſe 282.

IN country cauſes, that is, where the defendant lives above twenty miles from *London*, the defendant has eight days to plead in from the notice, four days longer than thoſe that live in town or nigh it. The defendant, after the four days rule to plead was out and before the eight days were expired, demanded *oyer* of the plaintiff's bond ſet forth in the declaration, and on the ninth day took out a ſummons from a Judge for that purpoſe, and for longer time to plead to it; the plaintiff being adviſed that *oyer* could not be demanded after the four days rule was expired, though the defendant had eight days to plead in, ſigned judgment notwithſtanding this ſummons. And now the defendant moved the Court to have it ſet aſide, *oyer* of the bond having never been given as demanded.

A defendant who lives above twenty miles from *London* has eight days to plead, and may demand *oyer* at any time before they expire.

8. Mod. 228.
1. Mod. 1.
4. Bac. Abr. 27.
6. Mod. 175.
Tidd's Pract. 243.

The queſtion was, Whether a defendant, who lives above twenty miles from *London*, and by a rule of the Judges has eight days to plead in from notice firſt given, has time to demand *oyer* of a bond, &c. any time before his pleading is out? or, Whether he ought to have demanded it before the firſt four days of pleading?

N. B. The rules to plead are never given for eight days, but all for four days, though the defendant has eight days to plead in.

Down *againſt* Rowell.

And as to the firſt queſtion, Willes, *Chief Juſtice*, and Denton, *Juſtice*, were of opinion, that the defendant ſhould have the ſame time to demand *oyer* in as he has time to plead in, without having any regard to the four days rule for pleading, which the Chief Juſtice ſaid ought to be made eight days in caſe the defendant lived twenty miles from *London*.

Fortescue Aland, *Juſtice*, on the contrary, thought that the defendant muſt demand *oyer* within the four days, though he has eight to plead in; becauſe, ſaid he, if the defendant can demand *oyer* in eight days, he may demand the ſame time to plead in abatement, and the conſtant rule has been, that the defendant cannot plead in abatement after four days.

William Fortescue, *Juſtice*, gave no opinion, but ſubmitted to his Brothers.

Summons, after time to plead has expired, is a nullity.

And another queſtion was, Whether this ſummons taken out by the defendant the ninth day, after his time for pleading was expired, though before the plaintiff had ſigned his judgment, could have any right in ſetting aſide the judgment, or was not taken out too late?

As to the laſt queſtion it was agreed, that if a ſummons for time to plead be taken out, after rules to plead are out, the ſummons will avail nothing, and the plaintiff may ſign his judgment notwithſtanding.

The judgment was ſet aſide.

Caſe 283.

Preſton *againſt* Funnell.

A deviſe "to *A.* "for life, with "remainder to "the neareſt re-"lation, *viz.* to "*B.* my bro-"ther's ſon, and "his heirs; re-"mainder to "my neareſt of "kin, firſt male "then female," directing that the eſtate ſhould never be ſold; but kept in repair, and deſcend to the family, conveys an *eſtate in ſ* to *B.*

At a trial of *niſi prius* the following caſe was made for the opinion of the Court:

T. Eagle ſeiſed in fee of copyhold lands ſurrendered them to the uſe of his will, and died. He deviſed them by his will in the following manner: "I give to my brother *T. Eagle* all my goods, "chattels, &c. houſes, lands and tenements, and whatever elſe I "have in the world, for and during his natural life, my debts and "legacies being firſt paid; and then the houſes and lands to the "neareſt of my relations, that is to ſay, to *Thomas Eagle*, my "brother's ſon, to him and his heirs; and after their deceaſe to "the neareſt of kindred to me, firſt male and then female; which "ſaid lands and houſes are never to be ſold, but to be kept in re-"pair; and that this houſe which I now live in is to deſcend to "the names of the *Eagles*, and to be kept up as long as the world "endures, and never to be ſold." That the teſtator died ſeiſed; after whoſe death *Thomas Eagle*, the brother, entered and died; and after, at a court of the manor, *Thomas Eagle*, the nephew, was admitted, and ſurrendered the premiſes for a valuable conſideration to one *J. Charles* and his heirs, who demiſed them to the

PRESTON *againſt* FUNNELL.

the defendant. The caſe further ſtates, that there is a cuſtom in the manor for the tenants to ſuffer a recovery of thoſe lands, of which a recovery ought by law to be ſuffered; and that *T. Eagle*, the nephew, before his death, never ſuffered any recovery of theſe premiſes in the manor court. The leſſor of the plaintiff is the neareſt of kin to the teſtator, and heir at law to him.

THE QUESTION therefore upon this caſe was, Whether *T. Eagle*, the nephew, took an eſtate in fee or in tail by this deviſe? If he took an eſtate in fee, then there was no need for a recovery, and conſequently the verdict will be for the defendant; if he took only an eſtate in tail, then he could not diſpoſe of it without a recovery, and having never ſuffered any, it will be for the plaintiff, as heir at law to the teſtator.

THE COURT were all of opinion that *T. Eagle*, the nephew, took an *eſtate in fee*; for it is plain that the teſtator meant and intended, by the words of his deviſe, to create a perpetuity, which the law abhors, and ought to be avoided. And we muſt conſtrue the word "heirs" to mean "heirs general" of the nephew, and not "heirs of his body." The rule of law upon conſtruction of this word "heirs," when there has been a limitation over, is, that where the firſt deviſee cannot want heirs as long as any of thoſe are in being to whom the eſtate is deviſed over, there the firſt deviſee ſhall only take an eſtate tail, though the deviſe be "to him "and his heirs," for "heirs ſhall be conſtrued only to mean "heirs "of his body;" but if the eſtate be limited over to a ſtranger, or to one or more who may not be heirs to the deviſee, there the word "heirs," though there be a deviſe over, ſhall paſs a fee to the firſt deviſee, and the deviſe over be void. Now here the neareſt of kin to the teſtator might be of the half-blood to *Thomas*, the nephew, who was the firſt deviſee, and conſequently not capable of inheriting to him; and the contrary does not appear upon the caſe. If we were to put any other conſtruction upon it, we muſt alſo conſtrue it "heirs male, &c." for it was plainly the intention of the teſtator that it ſhould always continue in the name and family of the *Eagles*; and if it was to be limited to daughters, that would defeat the teſtator's intention. The teſtator likewiſe might want heirs; for as it is limited to the neareſt of kin, that neareſt of kin might be of the half blood, which could not be inheritable to the teſtator.—Therefore WE ARE OF OPINION for the defendant, that *T. Eagle* had an eſtate in fee in him, and conſequently could diſpoſe of it without ſuffering any recovery.

Tapner *againſt* Murlett and Prior.

Caſe 284.

An eſtate for years cannot be coupled with an eſtate in fee.

UPON AN EJECTMENT the following caſe was made at the aſſizes for the opinion of the Court.

Sir Thomas Milner ſeiſed in fee of lands did, by leaſe and releaſe, in conſideration of the marriage of his daughter, convey them

Tapner *againſt* Murlett and Prior.

as follows: "to truſtees for the uſe of himſelf till the marriage "took effect; remainder to *Sir J. Farrington*, who was to marry "his daughter, for ninety-nine years, if he ſo long lived; re-"mainder to truſtees to preſerve contingent remainders; remain-"der to his daughter for her life; remainder to the ſons in tail "general, to daughters in tail general; and for want of ſuch iſſue "to the uſe of *J. Farrington*, his heirs and aſſigns for ever."

J. Farrington died without iſſue, and before his death made a will, by which he deviſed the premiſes in queſtion to *John Murlett*. *J. Murlett* died, and deviſed them to *Joſeph Murlett*, the defendant in tail. *Elizabeth*, the wife of *J. Farrington*, died afterwards without iſſue. *Joſeph Murlett* levied a fine in *Trinity Term*, which was recorded in *Hilary Term* following, from which time the proclamations were begun to be made, and continued to the *Trinity Term* following, in which Term the plaintiff brought an ejectment, three proclamations only being then paſt, but the fourth was afterwards made. The plaintiff made no other proof of an entry at the trial but by this ejectment. The plaintiff is the heir at law of *J. Farrington*, the deviſor; and *J. Murlett*, the defendant, claims under *J. Farrington*'s will, and *Prior* under *Murlett*,

The questions were:

First, What eſtate *J. Farrington*, the deviſor, had in him at the time of his deviſe to *Murlett*?

Secondly, What was the operation of this fine levied by *Joſeph Murlett*?

Thirdly, Whether this entry by ejectment is ſufficient to avoid the fine?

The Court ſaid, they ſhould give no opinion as to the firſt two points; only that *J. Farrington* at his death had an eſtate for years with a fee expectant, and that an eſtate for years was not ſuch an eſtate to which a ſee can be coupled; but his heirs muſt take as purchaſors and not by deſcent.

But the Chief Justice ſaid, he doubted whether the word "aſſigns," though it did not alter the eſtate, would not give *J. Farrington* a power to diſpoſe of it, and then the perſon nominated by the will of *J. Farrington* to take, may be underſtood to be his aſſigns; but ſaid he did not give this as his opinion, only as a doubt that aroſe with himſelf.

There muſt be an actual entry to avoid a fine.

As to the last question, they were all of opinion clearly for the defendant, that where one gets into poſſeſſion and levies a fine, either at common law or on the ſtatute, the perſon who is out of poſſeſſion muſt make an actual entry; and that the bringing

ing an ejectment is not a ſufficient entry in this caſe to bar the fine(a).

Fine for the purpoſe of barring ſtrangers, muſt be computed from the laſt proclamation, *i. e.* the Term in which it was laſt proclaimed.

It was held that a fine was ſaid to be engroſſed when it was brought to the chirographers and engroſſed by them, and that it could not be proclaimed till it had been ſo engroſſed. That it is a good fine from the time of levying, that is, from its being entered in the king's ſilver office, to all intents, except barring, on the ſtatute of Non Claim, 24. *Hen.* 7. c. 24. from which the fine muſt be computed from the laſt proclamation made, *viz.* five years after the Term it was laſt proclaimed in.

(a) See *accord.* Berrington *v.* Parkhurſt, 2. Stra. 1085. 4. Brown. P. C. 353. Fitchet *v.* Adams, 2. Stra. 1128. Oats *v.* Brydar, 3. Burr. 1897. Goodright *v.* Caton, Dougl. 486. But this only applicable to a fine with proclamations; for an actual entry is not neceſſary to avoid a fine at common law, Jenkins *v.* Pritchard, 2. Wilſ. 45. Muſgrave *v.* Shelly, 1. Wilſ. 214.

Creeke, Executor, &c. *againſt* Pitcharn.

Caſe 285.

An executor nonſuited on prohibition is not liable to coſts.

S. C. 1. Barnes, 103.
S. C. 2. Barnes, 100.
S.C. Co. G. 157.
S.C. Pract. Reg. 118.
See Hullock on Coſts, 313. 315. 321. where all the caſes on this ſubject are collected.

The defendant libelled in the ſpiritual court againſt the plaintiff, for tithes due to the defendant from the plaintiff's teſtator, and ſued him as executor, &c.; the plaintiff ſuggeſted a *modus*, and therefore obtained a prohibition at common law. At the trial the plaintiff in the prohibition made no evidence of the *modus*, and was nonſuited.

The defendant moved this Court, that the plaintiff, notwithſtanding his being executor, might pay the coſts of the prohibition.

But **the Court** denied it and ſaid, as he was ſued as executor he might well bring the prohibition as ſuch, and could not obtain it any other way, and therefore ought not to pay coſts. Indeed if one ſue as executor, &c. when he might have ſued in his own right, we ſhall have no regard to it, but make him pay coſts if any is due; but the plaintiff has ſued as he ought. All the Judges have agreed that coſts ſhall be taxed, upon a prohibition, from the time of the motion for the prohibition firſt made.

Anonymous.

Caſe 286.

Amendment, and the attorney ordered to pay the coſts.

In arrest of judgment it was moved, **First**, Becauſe the cauſe was tried as an action of treſpaſs, and the writ was purchaſed as an action of treſpaſs on the caſe.

Secondly, The writ was purchaſed againſt *James Stiles*, and the declaration was againſt *John*.

Thirdly, It was not laid in the declaration that the defendant took the plaintiff's goods, though it was in the writ.

Anonymous.

Fourthly, The *diſtringas* iſſued out to *the coroner* to return the jury, which is ſaid in the *juratur* to be returned by *the ſheriff*.

The Court. If the Judge has a right to try the cauſe, the errors and miſtakes of the clerk will not ſet aſide the verdict. All records are conſidered as the acts of the Court, and made up by it, and conſequently the Court might and ſhould amend them for their own honour and credit. Original writs were not amended, becauſe they iſſue out of another court; nor is there anything to amend them by, but here the *diſtringas* is a good copy by which to amend the *juratur*; in reality this declaration is very good, but if it had not it might be amended after verdict.

Willes, *Chief Juſtice*, thought this ſo great a neglect in the attorney, that he ordered he ſhould pay the expence of the motion.

Caſe 287.

Boſworth *againſt* Whiteman.

To debt on a by-law brought by the chamberlain of *London*, in the mayor's court of the city, againſt a perſon for refuſing the office of ſheriff, the court of king's bench, on the record being removed, will not permit a ſuggeſtion to be entered thereon, that the defendant is *a diſſenter*, and diſabled by the ſtatute from ſerving the office, he not having received the ſacrament, &c.

By a by-law of the city of *London* every citizen worth ten thouſand pounds, if elected, muſt execute the office of ſheriff or forfeit five hundred pounds, for which ſum the defendant, having refuſed to execute the office after having been elected to it, was taken; and the cauſe being removed into the common pleas by *habeas corpus cum cauſâ*, the ſheriff returned the cauſe aforeſaid: the defendant moved for leave to file a ſuggeſtion on this return, that he was *a diſſenter*, and diſabled by the ſtatute, not having received the ſacrament according to the uſage of the church of *England* within a year before.

Prime and Draper, *Serjeants*, ſtrongly inſiſted,

First, That the motion ought to be granted, becauſe elſe the Court cannot know the truth of the cauſe; nor,

Secondly, Whether the by-law is good or no, and conſequently whether they ſhall keep or remand the cauſe; and urged many authorities to juſtify their admitting this ſuggeſtion on returns of *habeas corpus*, as *Syd.* 287. 2. *Keb.* 50. 54. *Co. Ent.* 344. *Pye's Caſe.* So prohibitions are granted on ſuggeſtions contrary to the return on the face of the libel. 2. *Inſt.* 608. 2. *Roll.* 295. *Brown*, 36. 182. 271. That a ſuggeſtion has been admitted to prove an inferior court has not juriſdiction. 2. *Lutw.* 1023. *Lev. Ent.* 133.

They further argued, that the writ being directed to the ſheriff, mayor and aldermen, and returned by the ſheriff only, that in this return they deceived the Court, and a prohibition has been granted to a court-leet for ſo doing. 2. *Roll. Abr.* 217.

Lastly, The perſons who are to judge of this matter are to have the advantage of the fine. 2. *Vent.* 247. was cited to ſhew that *diſſenters* were excuſed from the office of ſheriff.

The

Bosworth *againſt* Whiteman.

The Court unanimouſly agreed not to grant the motion. And

Willes, *Chief Juſtice*, conſidered, First, Whether any ſuggeſtion ſhould be filed; Secondly, Whether this was a proper ſuggeſtion. He held that the Court was bound down to judge on the return of the writ; and by this neither party can ſuffer; becauſe if the writ was returned by an improper perſon, it was to be quaſhed, and be as no return; and if the return was falſe, the party injured may have an action on the caſe: on the contrary, ſhould they admit the ſuggeſtion, the party injured, if it be falſe, is without remedy, for it is not traverſable, which both diſtinguiſhes it from ſuggeſtions granted to found prohibitions on, and alſo from *audita querela*; for in prohibitions the party is obliged to ſuggeſt, and in *audita querela* it is traverſable (*a*). Suggeſtions were never granted but where the party has no other remedy, as in claiming *conuſance* (*b*). All the precedents mentioned in ſupport of the motion are of this nature, for they were all granted where the conviction and impriſonment was put on to the ſuit, and the party had no other remedy (*c*). This is alſo the caſe when the defendant is obliged to file a ſuggeſtion to bring himſelf within the ſtatute 4. *Jac.* 1. c. 3. for that is to recover coſts after plea pleaded, very often after verdict. In this caſe, the ſubſtance of the ſuggeſtion may be either pleaded, or given in evidence, on the general iſſue in either court. If it be doubted whether the by-law be good or not, the method to determine it is to proceed to judgment in the inferior court, and then bring a writ of error. Allowing this to be of the ſame nature with a prohibition, yet a prohibition is never granted until the ſuit is commenced and plea pleaded, becauſe in moving for the prohibition, it muſt be ſaid that the eccleſiaſtical court refuſed the plea. But if a ſuggeſtion might be filed, this is the moſt improper one in the world; becauſe, first, It is directly contrary to the return; secondly, If on this ſuggeſtion the Court ſhould think proper to retain the cauſe, they muſt ſuppoſe the inferior court will act illegally, which they will never do when they of the inferior court have juriſdiction; for which reaſon the motion muſt be diſcharged.

(*a*) Plowd: 76. Cro. Jac. 76.

(*b*) Trem. Ent. 177.

(*c*) Trem. Ent. 351.

Selmon *againſt* Courtenay.

Caſe 288.

To treſpaſs, the defendant cannot give "highway" in evidence on the general iſſue.

S. C. 2. Barnes, 350.

Action of trespass againſt the defendant for breaking the plaintiff's cloſe. The defendant pleaded "not guilty," and produced ancient witneſſes to prove this to be an highway, and ſo no treſpaſs; and had a verdict.

The plaintiff now moved to ſet aſide this verdict, being given upon illegal evidence, for that the defendant ſhould have pleaded it ſpecially, but inſtead of that he pleads "not guilty" and gives the highway in evidence, which cannot be done.

The queſtion was, Whether on "not guilty," this excuſe of an highway can be given in evidence?

Willes, *Chief Juſtice*, conſulted with all the Judges upon this queſtion, becauſe ſome of them had differed in their opinion, Whether it could be given in evidence or not? And he reported that the majority of them were of opinion, that it could not be given in evidence on "not guilty;" and that wherever a defendant confeſſes the allegation of the plaintiff to be true, but has ſomething to offer as an excuſe, he muſt always plead it ſpecially, or otherwiſe cannot give it in evidence.

Caſe 289.

Gurnett *againſt* Wood.

A deviſe to *A.* for life, remainder to *B.* in fee, he paying to *C.* forty pounds when he ſhall attain the age of twenty-one, and if *B.* die under the age of twenty-one, then to *D.* and his heirs for ever, he paying ſixty pounds to *C.* is an *executory deviſe*, and veſts in *D.* immediately; and therefore if he die in the life-time of *B.* and *B.* die under age, the heirs of *D.* ſhall take the eſtate.

Upon an ejectment the following caſe was made at the aſſizes for the opinion of the Court:

Thomas Gurnett, ſeiſed in fee, deviſed all his lands to *Dorothy* his wife, during her natural life, and after her deceaſe to *John*, his eldeſt ſon, in fee, paying to the teſtator's two daughters the ſum of forty pounds each when they ſhould attain the age of twenty-one years; and if his ſon *John* died under the age of twenty-one years, then he deviſed the premiſes to *William Harriſon*, his wife's ſon, and his heirs for ever, paying a further ſum of twenty pounds a-piece to his two ſiſters upon their attaining the age of twenty-one. The teſtator died, the wife entered, and enjoyed the premiſes for her life; *William Harriſon* died; and after that *John*, the firſt deviſee, died under the age of twenty-one years.

The queſtion was, Whether (*William Harriſon* dying in the life-time of *John*, the firſt deviſee) the remainder was ſo veſted in *William Harriſon* (*John* afterwards dying an infant) as to entitle his heir to take after *John*'s death by way of executory deviſe; or, Whether the heir of *John* ſhall take?

The Court were clearly of opinion that this was an intereſt veſted in *William Harriſon* in his life-time, and tranſmittable to his heir, and not *a poſſibility* only; and ſaid, that *executory deviſes* muſt now have the ſame rule as *contingent remainders*, and veſt immediately, ſo as to deſcend to the heirs when the contingency happens.

1. Co. 154.
4. Co. 66.
10. Co. 51.
Poph. 5.
Dyer, 244.
2. Roll. Abr. 795.
Jones, 417.
3. Com. Dig. "Deviſe" (N. 16.).

But the Court took ſome time to conſider of it; and afterwards Willes, *Chief Juſtice*, delivered the opinion of the Court.

Willes, *Chief Juſtice*. The caſe is no more than this: A deviſe to *A.* and his heirs upon a contingency; *A.* ſurvives the deviſor, but dies before the contingency happens. Afterwards the contingency happens. The queſtion is, Whether the heirs of *A.* ſhall take? No doubt the deviſe to *Harriſon* was an *executory deviſe*; for being after an eſtate given to another and his heirs in fee, it cannot be good by way of contingent remainder. For the plaintiff was cited *Brett v. Rigden*, *Plowd.* 345.; but that caſe differs from this, for it was "to *A.* and his "heirs,"

"heirs," an immediate deviſe, and he dying before the teſtator, it was adjudged he could take nothing; and rightly, for a will does not operate until the death of the teſtator; ſo that nothing ever veſted in *A.* and conſequently not in his heirs, for they were not intended to take by way of purchaſe, and by deſcent they could not, for that can never be where nothing veſted in the anceſtor. But in this caſe *Harriſon* ſurvived not only the deviſor but likewiſe the widow, who enjoyed under the firſt deviſee. Then it is objected, that this is only a bare poſſibility, which it is ſaid can neither deſcend, nor be aſſigned, deviſed, or barred by a common recovery; and to prove this were cited, *Fulwood's Caſe (a)*, and the caſe of *Peil v. Brown (b)*, where the laſt point is determined, that a common recovery will not bar it; and there are ſeveral other Books where the ſame things were formerly laid down. But it is to be conſidered, that moſt of thoſe reſolutions were before executory deviſes were in faſhion, or at leaſt before they were thoroughly eſtabliſhed, and I believe would not be law now. I do not ſay anything as to a poſſibility being barred by a recovery; but there are ſeveral caſes where a bare poſſibility has been held grantable or deviſeable, as well as a more certain intereſt, as in the caſe of *Goring v. Bickerſtaff (c)*, and *Veizy v. Tinevell (d)*. But admitting it to be otherwiſe, the objection will not hold in the caſe of an executory deviſe, for they are not to be compared to bare poſſibilities, but are to be conſidered as certain eſtates or intereſts, or as contingent remainders: indeed ſince executory deviſes have been eſtabliſhed, ſeveral rules have been laid down in order to prevent perpetuities: as firſt, that the contingency ſhould take place within the compaſs of a life or lives in being, or a reaſonable number of years: then the Courts went a little farther, and extended it to the caſe of an infant *en ventre ſa mere*, becauſe that contingency muſt take place in ſomething leſs than nine months, and ſo there is no danger of a perpetuity. And in chancery they have held it good, though not to happen till twenty-one years after a life or lives in being; but in all other reſpects executory deviſes have always been reſembled to contingent remainders; which appears in conſidering the reaſon on which they were founded, which is this: when it appeared the teſtator intended to give a contingent remainder, but had expreſſed himſelf ſo as it could not take effect as ſuch by the rules of law, the courts of juſtice in favour of wills, and to help an apparent intention, made it good as an executory deviſe, as far as the rules of law concerning perpetuities would admit. Conſidering then this deviſe in the ſame light as a contingent remainder, it was never doubted but that it veſted, though not in poſſeſſion, yet as a contingent intereſt immediately upon its creation, and conſequently tranſmiſſible. Not to mention other caſes, there is a late one very ſolemnly determined, which has put this matter out of all doubt, *viz. King* v. *Withus*: A deviſe to *B.* his daughter of two thouſand pounds, payable at the age of twenty-one or day of marriage, and if *C.* his ſon died without iſſue male living, then his daughter to have three thouſand pounds at the age of twenty-one or day of marriage; ſo that part of her fortune was certain, the reſt depended upon contingency. The daughter lived to be twenty-one years of age and married, but died before her brother *C.* ſo that at the time of her death her intereſt in the three thouſand pounds was but contingent; afterwards her brother died without iſſue male, upon which *Dr. King*, as her huſband, brought his bill for the additional fortune of three thouſand pounds. It was ſtrongly inſiſted, on the other hand, that her intereſt being only contingent, and ſhe dying before it could be known whether the contingency would happen or not, it could not be tranſmiſſible: but LORD TALBOT held it was no poſſibility, but an intereſt veſted and tranſmiſſible to him as huſband, and he as huſband was entitled ſo ſoon as the contingency happened. This was a fortune charged upon land, and ſo to be governed by the ſame rules as land. This decree, after a long hearing, was affirmed in the houſe of lords; and in this caſe many others were cited, where contingent intereſts, both real and perſonal, were held tranſmiſſible to the heir or repreſentative. A caſe was cited of *Marks* v. *Marks* (a), reported in *Chancery Precedents*, which I think the beſt book of chancery reports extant, as applicable to this caſe; and as this was determined ſolemnly by ſo great a man as LORD PARKER, together with THE MASTER OF THE ROLLS, I have no doubt but it is good law. But beſides that determined upon the old law, that where a feoffment is upon condition, and the anceſtor dies before the performance, his heir may perform it; the Court likewiſe conſidered it upon the foot of a mortgage and redemption. But without the aid of that authority WE ARE OF OPINION, that the defendant, as heir of *Harriſon*, is well entitled, notwithſtanding he died before the contingency happened of *J. Gurnett*'s dying under the age of twenty-one.

(a) 4. Co. 66. March, 136.

(b) Cro. Jac. 590.

(c) Pollexf. 32.

(d) Pollexf. 44. That a poſſibility coupled with an intereſt is not only deſcendible but deviſable, ſee Selwyn v. Selwyn, 2. Burr. Rep. 1131. Jones v. Perry, 3. Term Rep. 88. But ſee on this ſubject Fontblanque's Eq. 201.

Judgment for the defendant.

(a) Prec. in Chan. 406.—See alſo Goodright v. Searle, 2. Wilſ. 29. Fearne's Ex. Dev. 448.

Caſe 290. Luſhington, on the Demiſe of Godfrey, *againſt* Doſe.

A defendant in ejectment, who brings a writ of error, muſt give bail to pay the plaintiff his coſts, but need not enter into a recognizance himſelf.

S. C. 1. Barnes, 77. 3. Burr. 1823. 2501. 12. Mod. 138. Runn. Eject. 421.

THE PLAINTIFF had judgment in ejectment, and the defendants, three tenants in poſſeſſion and one owner of the inheritance, bring a writ of error, and become bound with two ſureties in a recognizance to the plaintiff, to pay him his coſts and damages if judgment be affirmed; but do not give their own recognizances, as the ſtatute 16. & 17. *Car.* 2. c. 8. directs in the caſe of dower and ejectment.

Upon which it was moved, that the plaintiff below might be at liberty to take out execution on his judgment, for that the writ of

LUSHINGTON, ON THE DEMISE OF GODFREY, *againſt* DOE.

error, without ſuch recognizance entered into according to that ſtatute, was no *ſuperſedeas.*

WRIGHT, *Serjeant*, ſhewed cauſe *againſt the motion*, and cited the caſe of *Barns v. Bulmer (a)*, that the plaintiff in error need not give his own recognizance, but that bail is ſufficient. And alſo cited 3. *Lev.* 275. 3. *Mod.* 281. *S. C.* to ſhew that where the judgment will not make him liable, there neither will his recognizance: as if the defendant in error ſhould die before the writ of enquiry executed, this would be a diſcharge as to the coſts and damages notwithſtanding the recognizance; and that it would be very inconvenient if plaintiffs in error in ejectment, who for the moſt part are tenants in the country, ſhould be obliged to come up from remote parts of the kingdom, as they muſt do, in order to give their recognizances in court.

DRAPER, *Serjeant*, *in ſupport of the motion*, urged the ſtatute itſelf, which ſays expreſsly that no judgment after verdict ſhall be ſtayed in any writ of dower or ejectment unleſs the plaintiff in error be bound, and ſays nothing about bail in this caſe, for that is mentioned in a different clauſe relating to perſonal actions only.

WILLES, *Chief Juſtice*. The ſtatute 3. *Jac.* 1. c. 8. firſt obliged the plaintiff in error to give bail; but that being only in actions of debt, is extended by the act of 16. & 17. *Car.* 2. now in queſtion, to all perſonal actions whatever. Dower and ejectment are mixed actions, therefore they are put in a diſtinct and ſeparate clauſe, and have no relation to what the former part of the ſtatute directs concerning bail; ſo that, conſidering the bare words of the ſtatute, the plaintiff in error's own recognizance is neceſſary, and giving bail is not ſufficient. But I believe it was not foreſeen by the Legiſlature, that upon all recognizances on writs of error the party muſt come up to town and be bound, though the ejectment be of never ſuch a trivial value, for our commiſſion under the ſtatute 4. &. 5. *Will. & Mary*, c. 4. for taking bail in the country, does not extend to writs of error; and this would be very inconvenient where the perſon lives a great diſtance off. The other reaſon ſeems likewiſe material, that bail is a better ſecurity, at leaſt in moſt caſes, than the plaintiff's own recognizance, if not in this particular inſtance; ſo that the intent of the ſtatute being ſatisfied, though not the expreſs words, I think we ought to adhere to the practice in this caſe, which is, that the plaintiff in error is only to give bail. And THE COURT being all of this opinion,

The motion was denied.

(*a*) Carth. 121.

Nelſon *againſt* Bael. Caſe 291.

An award that one of the parties ſhall pay the attorney's bill, is good.

UPON AN ACTION upon an arbitration bond an exception was taken to the award itſelf, *to wit*, It is ſaid in the award " that " the defendant ſhall pay the expences, charges, and fees of the " attorney."

NELSON *againſt* BAIL.

The defendant inſiſted that this was uncertain, theſe words not being referred to any certainty, as taxation by the prothonotary, &c. and by this award he is to pay the attorney's expences and fees, be they ever ſo large or extravagant; and that therefore this is void for incertainty.

WILLES, *Chief Juſtice*. Though part of an award be void, yet the other part may be very good, unleſs it has a neceſſary dependance upon that which is void; for if ſo all of it will be void, otherwiſe not. As to the incertainty complained of in this award, I think it is none, and that the direction of the arbitrators, that *Nelſon* ſhall pay the expences and coſts, &c. of the attorney, is good, becauſe it may be aſcertained by law by a proper officer; and that the word "coſts" can mean only the coſts of the ſuit, which may be reduced to a certainty by a taxation. If the thing to be paid cannot be aſcertained without another ſuit being brought, it will be void and bad; becauſe, inſtead of ending ſuits and controverſies, it will increaſe and multiply them. But the breach aſſigned here is, that *Nelſon* did not pay one ſhilling which he was awarded to pay to the defendant, which is a diſtinct part of the award, and may be good, though the other part of paying the expences and coſts, &c. of the attorney ſhould be uncertain and bad. But I think it is not, for one part of the award being void will not make the other ſo too unleſs dependant on it.

Judgment was given for the defendant that it is a good award (*a*).

(*a*) See Winter *v.* Garlic, 1. Salk. 75. 6. Mod. 195. Nutt *v.* Long, B. R. H. 181. Stra. 1025. Dudley *v.* Nettleford, Stra. 737. Tomlinſon *v.* Aniſkin, Comy. Rep. 330. Wall *v.* Falwood, Comy. Rep. 331. Phillips *v.* Knightly, 2. Stra. 903.

TRINITY TERM,

The Thirteenth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt. Chief Juſtice.*
Sir Francis Page, *Knt.* } *Juſtices.*
Sir Edmund Probyn, *Knt.* }
Sir William Chapple, *Knt.* }
Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

The King *againſt* Howard.

Caſe 292.

An information granted againſt a juſtice of the peace for adding another juſtice's name to an order of removal.

ON THE RULE for ſhewing cauſe why an information ſhould not go againſt the defendant for ſetting his father's name to an order for the removal of a pauper to his laſt ſettlement, it appeared, that in the county of *Radnor* there are but few juſtices, and that there is a cuſtom among them to make uſe of a brother juſtice's name, by their general conſent, in any caſe where the concurrence of two juſtices is neceſſary; that the defendant *Howard* is a juſtice of peace for this county, as is likewiſe his father; and a pauper being brought before him and examined, in order to be removed to his laſt ſettlement, the defendant after examination ſigned his own, and alſo put his father's name to this order of removal, who was in the county of *Middleſex* at that time.

The ſtatute 43. *Eliz.* c. 2. directs, that the pauper ſhall be examined before two juſtices of the peace, and upon ſuch examination be removed by them if they ſee fit; therefore as this pauper was removed but upon examination before one juſtice only, and by him removed, it was a piece of injuſtice done the pariſh (*a*). Upon which they moved for an information againſt the defendant.

Lee, *Chief Juſtice*. This is a matter which concerns the public liberty, for the act requires that all orders for the removal of a pauper ſhall be ſigned by two juſtices, and that no pauper ſhall be removed but by ſuch an order and examination; therefore I cannot think how this practice came into this county; this has always received the cenſure of this Court. The examination was not before the gentleman whoſe name is ſo ſet to it, and is therefore a manifeſt injuſtice to the pariſh where he is removed. The practice of the juſtices of this county is one great reaſon with me for granting this information (*b*) againſt the defendant, in order to prevent the like practice prevailing there for the future. Therefore I think an information ought to be granted againſt him.

The rest of the Court being of the ſame opinion, an information was granted.

(*a*) See Rex *v.* Forreſt, 3. Term Rep. 38. Rex *v.* Weſt, 6. Mod. 180. Billings *v.* Prince, 2. Bl. Rep. 1017.

(*b*) The defendant's father was at this time high ſheriff for this county, and the original motion was for an information againſt him for acting as a juſtice of peace in the ſame year in which he was ſheriff, contrary to the ſtatute, ſo that he was obliged to diſcover that he did not ſign his name to the order of removal, in order to acquit himſelf.

Caſe 293.

The King *againſt* Dr. Whaley.

If a *mandamus* be granted to the maſter of a college to admit a fellow, the Court will not ſuperſede the writ on an *affidavit* by the maſter that there is a visitor, but he muſt *return* that fact to the writ.

S. C. 2. Stra. 1139.
1. Stra. 565.

A MANDAMUS was moved for by one who had been choſen a fellow of a college in *Oxford*, but was refuſed to be admitted ſuch by the defendant, who was maſter. The *mandamus* was granted immediately on an affidavit of the facts, without giving a rule to ſhew cauſe, directing the defendant to admit the plaintiff fellow, or to ſhew good cauſe to the contrary.

The defendant now moved that this *mandamus* may be ſuperſeded, and the maſter of the college not obliged to make a return to it, on an affidavit made by the defendant himſelf that the *Biſhops of Ely* and their ſucceſſors have been always viſitors of this college, it being founded by one who was *Biſhop of Ely*; and that the preſent *Biſhop of Ely* is viſitor thereof, and therefore that a *mandamus* ought not to have gone.

The queſtion was, Whether, as a *mandamus* had been granted in the uſual courſe of the Court, it ſhall be now ſuperſeded, there appearing to be a visitor to this college? or, Whether the defendant ſhall be obliged to make a return to it, by which the whole matter will properly come before the Court?

Lee, *Chief Juſtice*. This application is by one who was choſen a fellow of this college but refuſed to be admitted, and there is no doubt but this is the proper and only remedy for one who enjoys not that right which he lawfully ought to do. If there is a viſitor to this college who is to viſit it generally, that will be a ſufficient anſwer to the *mandamus* that has been granted; for as it is the duty of this Court to give a remedy to him who wants it, ſo it is alſo their duty to ſupport a juriſdiction that has a legal foundation and is properly exerciſed. A *mandamus* has here iſſued, and the matter now comes on in the ſame manner as if it had been on a rule granted originally to ſhew cauſe. Now I do not ſee how the party injured can have a remedy, if there is not a return made to the *mandamus*. Here is a man complaining properly of an injury done him, but is told that there is a viſitor, to whom he muſt appeal; he is not ſatisfied that the viſitor has any right, how then muſt it be determined? If a return be made, he may bring an action upon the return, if he think it a falſe one, and try it legally; but if the Court ſhould not give him that opportunity by ſuperſeding this *mandamus*, he is without a remedy, and muſt be concluded by this ſingle affidavit of *Dr. Whaley*'s, which ſays that there is a viſitor; therefore I can ſee no reaſon why a return ſhould not be made to this *mandamus*, and am of opinion that it ought not to be ſuperſeded.

Page, *Juſtice*. It is a lay foundation, and every member has a freehold in it. Where the viſitor acts as he ſhould, he will be encouraged; but if he does anything againſt the ſtatutes of the college, he is no longer viſitor, but this Court will enquire of it.

Probyn, *Juſtice*. That this *mandamus* was granted without a rule firſt to ſhew cauſe, will be no reaſon for ſuperſeding it, becauſe it is uſually ſo done, and was ſo in the caſe of *The King* v. *Uſher*. The principal objection ſeems to be, that there is a viſitor to this college; but this is not a proper way to try that queſtion, but on the return to this *mandamus*, and there it will be on record; and if a viſitor appear, this Court will not take any cognizance of it. If the Court ſhould determine this queſtion now, as to the viſitor, and falſly, the other party has no remedy; for no writ of error lies in this caſe to any other court. And therefore I am of the ſame opinion, that a return ought to be made.

Chapple, *Juſtice*, was of the ſame opinion *in tot.* and cited a caſe, 13. *Lev.* 45. where a *mandamus* was granted though there appeared to be a viſitor.

The defendant's motion was denied (*a*).

(*a*) That the Court will ſuperſede a *mandamus* to admit a fellow, on *a return* that there is a visitor to the college, ſee Show. 74. 3. Mod. 265. 1. Sid. 71. 1. Mod. 82. 2. Lev. 15.; and under what circumſtances the courts of common law will interfere where there is a viſitor, ſee Philips *v*. Bury, Skin. 447. Rex *v*. Biſhop of Cheſter, 1. Wilſ. 206. Rex *v*. Grundon, Cowp. 322. Rex *v*. Biſhop of Ely, 2. Term Rep. 290. Rex *v*. Biſhop of Ely, 5. Term Rep. 475.

Caſe 294. The King *againſt* Greenwood.

The Court will not bail a perſon committed for highway robbery, if the proſecutor is poſitive of the identity of perſon.

S. C. 2. Stra. 1138.

THE DEFENDANT was indicted and ſent to *Newgate* for robbing the proſecutor on the highway, and now moves the court of king's bench to admit him to bail on ſeveral affidavits of perſons who ſaw and converſed with him in *London*, at or about the time the proſecutor ſwore he was robbed; and alſo produces affidavits that he is a man of good character, and kept a riding-ſchool, and had above one hundred pounds *per annum* real and perſonal eſtate, beſides his profeſſion, which brought him in above two hundred pounds *per annum* more.

The proſecutor being in court was aſked, whether he was certain that *Mr. Greenwood* was the perſon who robbed him? He ſaid he was very certain that he was the perſon, and had ſeen him before that time in the *Tennis Court*.

LEE, *Chief Juſtice*. This Court has a power to bail in all caſes, even in high treaſon; but it is a great truſt repoſed in the Court, and ſuch as they ought to exerciſe with the greateſt caution. It is true that priſons are intended for the ſecurity, and not for the puniſhment of the offender; but I do not know any caſe where this Court bails one charged of a capital crime, unleſs there be the greateſt reaſon to believe his innocency. Here the proſecutor ſeems very poſitive to the man, and what the defendant has now offered by his affidavits may and will be a very proper defence for him at his trial; but upon the whole, as the proſecutor is ſo very poſitive, I think we cannot bail the defendant in this caſe.

The reſt *ad idem*.

The defendant was remanded to *Newgate*.

Caſe 295. The King *againſt* Pocock.

The Court will not grant *an information* for ſaying of a juſtice of the peace, "*He is a rogue,* "*and a forſworn* "*rogue.*"

S. C. 2. Stra. 1157.

ONE *Bartholomew* having a colt ſtolen, went along with *Pocock* the defendant to *Mr. Kent*, a juſtice of peace in *Berkſhire*, in order to have a warrant againſt the felon; and though he made oath to the theft, the juſtice refuſed to grant his warrant. In converſation at a public-houſe after this, *Pocock* aſked *Bartholomew* whether *Mr. Kent* was a ſworn juſtice? *Bartholomew* anſwered, "Yes, or certainly he would not act as ſuch;" to which *Pocock* replied, "Why then *he is a rogue, and a forſworn rogue.*"

Upon which words an information was moved for againſt *Pocock*.

MR. SOLICITOR GENERAL, *to make the rule abſolute*, cited the caſe of *The King v. Derby (a)*, where an indictment was held to lie againſt a perſon for ſaying of a juſtice of peace, "he is a buffle-

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(a) Carth. 14. Comb. 65. 3. Mod. 139.

"headed fellow, underſtands not law, and has not done juſtice to "my client;" becauſe ſuch words do not reſpect the perſon of the juſtice of peace, but relate to him as he is a public magiſtrate and ſubordinate to the government; and therefore ſuch defamatory words are a reproach to the ſupreme governor, to whom magiſtrates are intruſted, and from whom they derive their authority; and it cannot be denied that words reflecting on the government are puniſhable at the ſuit of the king, by an information.

Lee, *Chief Juſtice.* There is great difficulty with me, whether this information can be granted in point of law. The caſe of *Rex v. Darby* was a caſe of the ſame nature with the preſent, and it was there held that an information ſhould go; but in the caſe of *The Queen v. Wrightſon (a)*, which is ſubſequent to the caſe of *Rex v. Darby*, and was very much litigated and ſpoken to by the beſt Counſel, and contradicted by no caſe ſince, is a different determination: the words there were ſpoke of a juſtice of peace in diſcourſe concerning a warrant granted by him, that "he was a "fool, an aſs, and a coxcomb for making ſuch a warrant, and he "knows no more than a ſlickhill." Upon a demurrer to an indictment for theſe words the Court at firſt, upon the authority of *Rex v. Darby*, inclined to think the words indictable, but afterwards determined they were not ſo, and expreſsly denied the caſe of *Rex v. Darby* to be law. The Court went upon this diſtinction, that where defamatory words are ſpoken to a juſtice of peace, in the very exerciſe of his office, there they are indictable, and conſequently ſubject to an information, becauſe they are an impediment to juſtice, a breach of the peace, and an immediate reproach to the government for appointing an unfit perſon to an office which ſo materially concerns the adminiſtration of juſtice. But where a perſon reflects upon a juſtice of peace for an act already done, though done as a juſtice of peace, it is only a breach of good manners, and he is not ſubject to an information; for the juſtice is in ſuch caſe conſidered as a private perſon, and his remedy is by binding the party to his good behaviour, or by an action on the caſe. The preſent caſe refers to an act done, *viz.* the refuſing *Bartholomew* a warrant; ſo that although words of defamation are ſpoken of a juſtice of peace as ſuch, yet they are not ſubject to an information unleſs ſpoken to him in the actual diſcharge of the duties of his office, and at the time of his doing ſome particular act as juſtice. The caſe of *The Queen v. Wrightſon* went very much upon that of *The Queen v. Soley (b)*, who was indicted for theſe words, "He is not fit to be a juſtice; for if a man is before "him, he will give it right or wrong where his affection is:" and it was ruled the indictment lay not.

Page, *Juſtice*, of the ſame opinion.

Chapple, *Juſtice.* It has been endeavoured to difference this caſe from that of *The Queen v. Wrightſon* by ſaying, that the words

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(a) 2. Salk. 698. (b) 4. Ann.

ſpoken

The King *againſt* Pocock.

ſpoken in that caſe relate only to the underſtanding of a juſtice of peace, but here they affect his honeſty and integrity; but I am of opinion this makes no difference, for the government is equally reflected upon for putting a fool in office as a knave; and I am of the ſame way of thinking with my Lord Chief Juſtice.

Wright, *Juſtice*. There is a material difference where words are ſpoken to a juſtice of peace himſelf, and where to a third perſon in converſation, for the latter is not ſo open or ſo great an inſult as the former. In the caſe of *The King v. Barrow (a)* a juſtice of peace committed a perſon for coining, for which *Barrow* ſaid, "the "juſtice is a rogue and a raſcal, and I can prove him ſo;" and it was held that he was not indictable; but if the words had been ſpoke *to* the juſtice of peace himſelf, and at the time of exerciſing his office, they would have been indictable, becauſe a breach of peace.

Let the rule be diſcharged.

(a) Trinity Term, 1. Geo. 2.

MICHAELMAS TERM,

The Thirteenth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt.* *Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
Sir William Chapple, *Knt.*
Dudley Ryder, *Eſq.* *Attorney General.*
John Strange, *Eſq.* *Solicitor General.*

The King *againſt* Dr. Betteſworth. Caſe 296.

MANDAMUS to the defendant, who is head of the prerogative court of *Canterbury*, to grant adminiſtration to the plaintiff of his wife's goods and effects, &c. The defendant returns, "that one *A. B.* gave to the plaintiff's wife in " her life-time ſuch and ſuch an eſtate and effects (*prout* in return " to the *mandamus*), and particularly ordered that her then huſ- " band, who was the plaintiff, ſhould have nothing to do there- " with, either in his life-time or after her death, and that after " her deceaſe it ſhould go to ſuch perſon as ſhe ſhould in her life- " time appoint, either by will or otherwiſe; that the plaintiff's " wife made her will in writing, which they found was duly ex- " ecuted, and thereby gave theſe effects, &c. to one *B. C.* whom ſhe " made executor, &c. and therefore he cannot grant adminiſtration " to the plaintiff."

A *mandamus* lies to grant to the huſband adminiſtration of his wife's effects, though ſhe have made a will, of property deviſed to her after marriage, with expreſs power given by the teſtator for her ſo to do, without her huſband's interference.

S. C. 2. Stra. 891. 956. 1111 1118.

And the queſtion was upon this return, Whether adminiſtration ought to be granted to the huſband, or not?

There is no doubt here but the huſband is entitled to have adminiſtration granted to him. The huſband, by act of parliament, is the only perſon entitled to adminiſtration to the wife, unleſs he, by ſome act of his own, ſhall part with that right, either before or after

The King against Dr. Bettesworth.

after marriage, in which caſe the wife may make a will, or do any act purſuant to the power given her. Now here is no act returned to have been done by the huſband to debar him of this right, nor does the will of *A. B.* give her any power to make a will, only at moſt an appointment in equity of a particular eſtate, which cannot be done by will; and beſides the wife might have ſome other conſiderable eſtate or effects which none but her huſband could be entitled to. Therefore

A peremptory *mandamus* muſt go to grant adminiſtration to the huſband.

Caſe 297.

Walton *againſt* Jordan.

A bankrupt cannot be diſcharged on the Inſolvent Debtors Act, he having no effects to deliver, they being in the aſſignees.

IN the inſolvent debtors act there is a clauſe which gives power to a creditor to bring up a priſoner on a petition, and to oblige him to deliver in a ſchedule of his effects, and ſo to be diſcharged.

The defendant procured one of his creditors, without giving notice to any of his other creditors, to bring him up by virtue of this clauſe, and ſo he got himſelf diſcharged; but at the time of this diſcharge he was a bankrupt, and had never had any certificate from the commiſſioners, and therefore was afterwards taken by the plaintiff upon an eſcape-warrant.

The queſtion was, Whether his diſcharge under the Inſolvent Act, he being then a bankrupt, be good or not?

The Court held, that the defendant's diſcharge was illegal, it appearing that he was a bankrupt at that time, and therefore could not have any goods or effects to deliver up, they being in all the aſſignees; the conſequence of which is, that this was an eſcape, and therefore he might be well taken up on an eſcape-warrant.

HILARY TERM,

The Thirteenth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt. Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
Sir William Chapple, *Knt.*
Dudley Ryder, *Eſq. Attorney General.*
John Strange, *Eſq. Solicitor General.*

The King *againſt* Munoes.

Caſe 298.

THE DEFENDANT was indicted on the 33. *Hen.* 8. c. 1. as a cheat, for fraudulently getting away from the plaintiff a promiſſory note, under pretence of getting it indorſed and paid by a perſon in the next room, which note the defendant got from the plaintiff by falſe tokens, and under colour and pretence that he would bring her the money for it, whereas he never brought the money nor returned the note again.

In an indictment on 33. *Hen.* 8. c. 1. the *falſe token* by which the impoſition was effected muſt be ſet forth.

S. C. 2. Stra. 1127.

Upon this indictment the defendant was found guilty, and now moves in arreſt of judgment, and takes two exceptions to the indictment:

FIRST, That it is not ſufficient to ſay in the indictment that the defendant made uſe of falſe tokens, but it ought to be ſpecified in particular what thoſe falſe tokens were which the defendant uſed.

SECONDLY, That the uſing of words and promiſes only is not ſufficient for an indictment, unleſs the defendant uſes ſome credentials to deceive the plaintiff, as a falſe key, &c. a letter, or ſome other viſible mark.

And of that opinion was the Court, that it was neceſſary to lay in the indictment what the falſe tokens were, and that the making

uſe

THE KING against MUNOZ.

uſe of words only was not ſufficient for an indictment, for the act ſays falſe tokens or counterfeit letters.

Judgment was ordered to be ſtaid (*a*).

The defendant was found guilty upon an indictment, which was, that the defendant came to *A.* who had a promiſſory note of five hundred pounds, pretending that he had a friend in the next room who would advance the money for it, whereas there was no ſuch perſon there; by means of which falſe tokens he defrauded the ſaid *A.* of the note, &c.

And it being moved in arreſt of judgment, that it did not appear by the indictment that the defendant uſed any falſe tokens; and that a charge of uſing falſe tokens generally was not ſufficient, the Court took time to conſider of it; and the laſt day of the Term,

THE CHIEF JUSTICE delivered the opinion of the Court to this effect: This was an indictment wherein the firſt count ſets forth, that the plaintiff being entitled to a promiſſory note of five hundred pounds, and the defendant intending to defraud her of it, pretended that he had a friend in the next room who would diſcount it. The ſecond count charges the offence to have been committed by means of the ſaid falſe tokens. A motion has been made in arreſt of judgment; and the exceptions were, that the firſt count was but a charge of falſe affirmation whereby he acquired the note, and there was cited the caſe of *The King* v. *Jones* (*b*), reported by *Mr. Salkeld*, which I take to be a true account of that caſe, and which agrees with *a manuſcript* I have ſeen of that caſe, wherein is cited a like judgment; *The Queen* v. *Gratland* (*c*), wherein it is likewiſe held, that a *falſe affirmation* does not amount to *a falſe token*, but that appears to be confirmed by the ſame fact in the other part of the indictment; and there being no other fact mentioned, it comes to this queſtion, Whether charging a man to come with falſe tokens, generally, is ſufficient, without ſpecifying them? There was no caſe cited to warrant that general charge; and I apprehend it is not ſufficient in an indictment to charge coming with falſe tokens generally. It is ſaid in 2. *Cro.* 20. that an indictment charging any with a *tort*, ought to be preciſe in the point of the *tort*. In *Young's Caſe* (*d*), where a wound was charged to be given *circa pectus*, &c. it was held to be too general, &c. which ſhews how preciſely the fact, which makes the offence, ought to be expreſſed. In *Hale's Pleas of the Crown* it is ſaid, that any ſpecies of death of the ſame kind with that in the indictment, may be given in evidence. This is only a general charge, if conſidered excluſive of the *falſe affirmation*. And in *Lev.* 299. where an information was for being *communis perturbator pacis*, &c. the

charge

(*a*) See 4. Com. Dig. "Indictment" (G. 3). 4. Hawk. P. C. ch. 25. ſ. 57. 2. Hawk. P. C. ch. 71. Rex v. Maſon, 2. Term Rep. 586. Rex v. Young, 3. Term Rep. 98.

(*b*) Salk. 379.

(*c*) Eaſter Term, 8. *Ann.*

(*d*) 4. Co. 40.

The King *against* **Munoze.**

charge was held to be too general, though a general charge of barratry is good, as *communis barectator*. Other caſes have been likewiſe cited, as *The King v. Macarty (a)*, *The Queen v. Eddy (b)*, where one man perſonated another, and pretending to be a ſoldier received another's pay. *Lord Hale* ſays (*c*), if *A.* come to *B.* and by a falſe meſſage or token receive money of him, it is a cheat puniſhable by indictment at common law, or upon the ſtatute 33. *Hen.* 8. c. 1. but that is a very general ſaying, for it is certain that a parol meſſage or token, by words of mouth only, is not indictable upon the ſtatute 33. *Hen.* 8. c. 1. unleſs he be underſtood to mean a meſſage in writing; for there muſt be a letter or ſome falſe token, a bare affirmation is not ſufficient.

Therefore, upon theſe grounds, I think it proper that this judgment ſhould be arreſted.

(a)

(b) Hilary Term, 10. *Ann.*

(c) 1. Hale P. C. 506.

Haſwell *Qui Tam againſt* Shallee and Others.

Caſe 299.

If an importer of wine in caſks, or a wholeſale dealer, ſell three dozen of quart bottles of wine, unmeaſured, to three different perſons for their private uſe, this is a retailing of wine within the ſtatutes 12. *Car.* 2. c. 25. and 15. *Car.* 2. c. 14. And *Quære*, If it is not an offence within 7. *Edw.* 6. c. 5. ſ. 8.

THE PLAINTIFF, *qui tam*, *&c.* brought an action on the ſtatute 12. *Car.* 2. c. 29. againſt the defendants for retailing wines without a licence; and upon the general iſſue, *nil debet* being pleaded, the jury, as to part, found a general verdict for the plaintiff; and as to the reſidue, they found ſpecially, that the defendants are wholeſale importers of wine, and paid the duty for the ſame; that they took the oath, which is, "That they are importers by wholeſale, and that the wine mentioned in their entries does not belong to a vintner or retailer." The verdict further found, that the defendants are not free of THE VINTNERS COMPANY; that they ſold red port in three dozen of bottles, commonly called quart bottles, to three different perſons, but that it was not meaſured, or by the gallon; and that it was drank in the private families of the buyers. But whether upon the whole matter in form aforeſaid found, &c.

S. C. 2. Stra. 1124.

S. C. And. 392.

WYNNE, *Serjeant*, *for the defendants*, admitted the general queſtion upon this verdict to be, Whether the defendants have been ſuch retailers as ought to have taken out a licence? but argued that ſuch queſtion may be divided into two queſtions: FIRST, Whether a merchant importer is obliged by the act to take out a licence to retail? SECONDLY, Whether ſelling wine, in the manner hereby found, is retailing it within the penalties of the act? To bring a caſe within the act, it is neceſſary that the wine ſold be ſpent in the ſeller's houſe, or in a houſe in his tenure or occupation; for the words of the act, "to be ſpent in the houſe," run through the whole ſentence. In *Hard.* 339. LORD HALE ſays, that the miſchief intended to be prevented by the act was not only to hinder diſorders in taverns, but alſo to prevent the number of taverns; and the ſingle point which the Court adjudged in that caſe was, that a man was not licenſed to keep a tavern by having a licence to retail wine. It was alſo MR. BARON TURNER's opinion in that caſe, that merchant importer, vintner, and retailer, are ſynonymous terms. The caſe of *Aſtell v. Andrews* (a) differs from the preſent; the oath is not there found; in that caſe it was found, that the wine was ſold to be ſpent in an inn; it was a ſale by a ſingle gallon, which is prohibited in expreſs terms: here the defendants ſold the wine in bottles, unmeaſured by any meaſure; and, inſtead of being ſold to a public inn, the wine was drank in private families.

THE SECOND POINT is, Whether ſelling wine in this manner is retailing it within the penalties of the act? It is not found that the defendants ever ſold a pint, or a quart, or a ſingle gallon, which was the caſe of *Aſtell v. Andrews.* The Jury's finding that the defendants ſold wine in bottles commonly called quart bottles, is inſufficient, for nothing is to be taken by inference or collection in a ſpecial verdict (b): and in the caſe in *Hard.* 339. though a licence to retail wines was in effect to keep a tavern, yet the Court would not intend it to be ſo in a ſpecial verdict.—This finding is alſo uncertain, for there are ſeveral kinds of bottles commonly called "quart bottles;" there is "a ſoldier's bottle," "a parſon's bottle," "a proctor's bottle," and "a fellow's bottle;" and yet theſe bottles, which are commonly called quart bottles, do in reality hold two quarts. The jury have found that this wine was ſold by no meaſure, and it cannot be intended that it was by meaſure only, becauſe they find the bottles commonly called quart bottles, which is an uncertain finding: a bottle is no determinate quantity in law, or known meaſure, which is the manner in which the acts of parliament deſcribe a trader. And the ſtatute 1. *Geo.* 2. called the Bottle Act, is the only law that mentions bottles; and yet it does not aſcertain what is the meaſure of a bottle, &c.

MR. SOLICITOR GENERAL *for the plaintiff.* Wholeſale importers are clearly within the general words of the act; and it will deſcend to retailers. The words of the act include any greater or leſſer meaſure. The Serjeant ſays, that a bottle is no meaſure; but the general words of the act are deſigned to take in any kind of meaſure, though the wine was drawn directly into one without any intervening meaſure. The caſe in *Hardr.* 339. the Court being divided, can be of no earthly authority in the world. The general queſtion upon this verdict will be, Whether the defendants were ſuch retailers as ought to have taken out a licence? for if they are, they will be liable to the penalty, otherwiſe they will not. It muſt be admitted, that at common law wine might be ſold by any perſon, in any proportion or meaſure, without incurring a moleſtation, unleſs the ſeller kept a diſorderly houſe: this being found to be inconvenient, a remedy was attempted ſo long ago as in the reign of *Edward*

(a) 2. Stra. 718. S. C. Ld. Ray. 1421. (b) Cro. Car. 549. Show. 589.

HASWELL qui tam againſt SHALLEY AND OTHERS.

the Sixth; for by the ſtatute 7. *Edw.* 6. c. 5. ſ. 3, 4. retailers of wine are to be licenſed, and the wine not to be ſpent in the retailer's houſe. The 12. *Car.* 2. c. 25. makes ſome further alterations, and allows retailing wine within doors, the perſon having a licence. The 15. *Car.* 2. c. 14. recites the former, and ſhews that the intention of the Legiſlature was, that the place where the wine was to be ſpent ſhould be indefinite, and that it ſhould be licenſed, whether ſpent in or out of the houſe where it was ſold. The difference between a wholeſale and retail trader is, that a wholeſale trader imports his wine in pipes or hogſheads, and ſells it in the ſame manner. What is contended for on the plaintiff's part, is chalking out a way to evade an act of parliament, and would open a door to the practice of ſelling wine in ſmall quantities, which is retailing. If a wholeſale draper cut a piece of cloth, it is retailing it; ſo if a wholeſale grocer ſell a pound of plumbs, &c. he retails them. In theſe kinds of actions, in the city, the general queſtion is, Whether the party cut the piece, &c. or not? for if he did, it is retailing; and I remember a caſe at *niſi prius* wherein it was ſo determined. The ſame objection which has been made here was made at the trial of this cauſe, *viz.* that it did not appear that the word "bottles" was in the ſtatute, or into what meaſure the wine was drawn. If, therefore, what the defendants have done is ſelling by retail, it is within the act, though not in the particular meaſures ſpecified therein; for the act likewiſe mentions generally "any greater or leſſer meaſure." The ſpecial verdict ſtates the wholeſale importer's oath, who ſwears that the wine entered does not belong to a vintner or retailer: how far the defendants conduct is conſiſtent with their oath, muſt be left to their own conſciences; for the reaſon of the oath is, that wholeſale importers pay leſs duty; and it is to be feared that they have taken the wholeſale oath in order to ſave that, and yet have made a greater profit in ſelling by retail. It has been endeavoured to diſtinguiſh the caſe of *Aſtell v. Andrews* from the preſent, becauſe there the oath is not found, though THE SERJEANT himſelf was pleaſed to ſay afterwards that the finding of the oath in this caſe was unneceſſary and immaterial; but as that is a caſe in point for the plaintiff, it is to be hoped it will obtain a judgment in point. The caſe of *Aſtell v. Andrews* was an action upon this ſtatute, wherein the jury found the defendant to be a merchant importer at *Briſtol*; that he ſold one gallon of wine to a perſon, who carried it to the *George Inn*, in *Briſtol*, and that it was drank there; and though it was argued by MR. FAZAKERLY that the defendant had done but one act, and that the wine was ſpent at another houſe, and that it was of ill conſequence to extend penal laws beyond the expreſs words of them; the Court held that this was a retailing within the act, and judgment was given for the plaintiff.

THE WHOLE COURT inclined, that this was a retailing in the defendants within the ſtatute, and that the act ought not to

Haswell qui tam *againſt* Smaller and Others.

be evaded by the party's making uſe of the meaſure of a bottle, or ſuch other meaſure as he thought proper.

Probyn, *Juſtice*, obſerved, that there was another diſtinction of a bottle, beſides thoſe taken notice of at the Bar, which had not been mentioned; and that was "an honeſt bottle," which is a quart, whether the meaſure of it be made of glaſs or pewter, &c.

The Court likewiſe inclined, that the caſe of *Aſtell v. Andrews* was not exactly in point to this caſe, and ordered this to ſtand over for another argument.

Afterwards, in *Hilary Term* 1739, in the thirteenth year of *George the Second*, THE COURT RESOLVED, that the ſelling as aforeſaid was retailing.

An appeal was afterwards brought in the Houſe of Lords, where the judgment was reverſed (*a*), and *a venire de novo* awarded (*b*).

(*a*) The reaſon of this reverſal was, becauſe the quart bottles were not found by the ſpecial verdict to be a retail meaſure, S. C. 2. Stra. 1125. But ſee upon this point a note in Mr. Nolan's edition of Strange's report of the ſame caſe.

(*b*) That a court of appeal may award a *venire de novo*, ſee Knyaſton *v.* Mayor of Shrewſbury, 2. Stra. 1053. Parker *v.* Wells, 1. Cook's B. L. 166. 1. Term Rep. 783. Lickbarrow *v.* Maſon, 5. Term Rep. 367. Harwood *v.* Goodright, Cowp. 91. Grant *v.* Aſtle, Dougl. 722. Bent *v.* Baker, 3. Term Rep 37.

Caſe 306.

Ford's Caſe.

An *information* will not lie againſt a churchwarden for not collecting brief-money.

S. C. 2. Stra. 1130.

KETTLEBY moved for an information, upon the ſtatute 4. *Ann.* c. 16. againſt *Ford*, ſole churchwarden of the pariſh of *Sutton*, in the county of *Suſſex*, for not going about the church to collect money upon *a brief*, after it had been duly read in the church, in his hearing, by the *Rev. Mr. Julius Bates*, miniſter of that place; and he cited the caſe of *The King v. Perkins* (*a*), where the Court granted a criminal information upon that ſtatute for burying in woollen; ſo in the caſe of *The King v. Harriſon* (*b*).

Probyn, *Juſtice*. In thoſe caſes part of the money was for the revenue; but in this caſe it is a private charity, and the method preſcribed by the act ought to be purſued. This act only gives a liberty to collect.

Lee, *Chief Juſtice*. I ſee no reaſon to grant an information, unleſs you mean ſuch an information as the act mentions; or even a rule to ſhew cauſe in this caſe, for the act points out a method. It is ſworn, that the churchwarden being at church did not go about to collect; and if he has been guilty of a breach of the act, you may puniſh him by indictment, if you think fit.

Page and Chapple, *Juſtices*, were of the ſame opinion.

And the motion was denied by THE WHOLE COURT.

(*a*) Hilary Term, 9. *Geo.* 2.

(*b*) Trinity Term, 1737.

TRINITY TERM,

The Fourteenth (a) of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt, Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir William Chapple, *Knt.* } *Juſtices.*
Martin Wright, *Eſq.*
Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

The King *againſt* Bigaman and Cockeril.

Caſe 301.

Juſtices for a borough cannot commit to county gaol.

See the ſtatute 15. *Geo.* 2. c. 24. and 24. *Geo.* 2. c. 55. 3. Hawk. P. C. 7th edit. ch. 8. page 70.

THIS was a motion for an information againſt the defendants, as juſtices of peace for the borough of *Scarborough*; and the complaint was, that, the plaintiff being convicted before them of A RIOT, they ſent him to *York Caſtle*, the county priſon, whereas they ought to have committed him to the corporation gaol.

SECONDLY, That they refuſed to accept of the bail which was offered them, and notwithſtanding ſent him to priſon.

On ſhewing cauſe, the defendants offered in excuſe to this charge, that the corporation gaol was in the poſſeſſion of the other party (there being a diſpute in the corporation concerning the election of their magiſtrates, ſo that there were two ſets of juſtices, &c.); and that if they had committed the plaintiff to that gaol, he would not have been received, and therefore they ſent him to the county gaol.

As to THE SECOND CHARGE they alledged, that the perſons who were offered as bail were accomplices with the plaintiff, and

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(a) See Burr. S. C. 163. pl. 58. note to 2d edition.

The King *againſt* Bigaman and Cockerill.

had been concerned in the ſame riot; for which reaſon they refuſed their bail.

Curia. Though what the defendants have done in this caſe is not ſtrictly juſtifiable according to law, as ſending the plaintiff to the county gaol, which is not within their juriſdiction, and refuſing to admit him to bail, yet as there does not appear that any oppreſſion was intended, it will not be ſufficient cauſe to grant an information; and without that circumſtance, the Court always refuſes an information againſt a miniſter of juſtice; for the plaintiff is not without other remedy.

The rule for an information was diſcharged.

Caſe 302.

The King *againſt* Morgan.

The preſiding officer at an election under the ſtatute 11 *Geo* 1. c. 4. muſt be *the neareſt perſon in place and office* to the abſent mayor.—And if a charter appoint the election of the mayor to be the next day after *a month* from the preſcriptive day, it means *a lunar month* after ſuch day.

A MANDAMUS was prayed on the ſtatute 11. *Geo.* 1. c. 4. againſt the mayor of *Aboryſtyn*, in *Wales*, to go to an election of a mayor, there having been no election at the uſual day, nor within the day after, as this act directs.

On ſhewing cauſe the defendant inſiſted, that there was an election, as the act directs, on the day after the preſcriptive day, which is proved to be at a court-leet to be held within one month after *Michaelmas-day*; and it is alſo ſworn, that the month has always been computed according to the longeſt calendar month, which is thirty-one days; ſo that by this computation the preſcriptive day is the thirtieth of *October*, and they went to an election the thirty-firſt of *October*; and therefore that the *mandamus* ought not to go.

To this defence the plaintiff made two objections.

First, That the month for holding the court-leet ought to be a lunar month, and not a calendar month; and if ſo, the election ought to have been on the twenty-ninth of *October*; and then this election will not be within the time which the act preſcribes.

Secondly, That the perſon who preſided at ſuch election does not appear to have any right. It was ſaid, that *Williams*, who was the preſiding man, was one of the magiſterial officers next in office to the mayor; whereas the act ſays, he muſt be the neareſt then preſent in place and office to the mayor; and this man is only ſaid to be one of the neareſt.

Lee, *Chief Juſtice.* The affidavits to ſupport this *mandamus* have ſet forth, that here was no due election. The ſtatute 11. *Geo.* 1. c. 4. ſ. 2. which directs the *mandamus*, ſays, it ſhall be granted, either if there has been no election at all, or if ſuch election afterwards ſhall become void. In the *Caſe of Fintagen* (a), an

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(a)

election

THE KING *againſt* MORGAN, MAYOR OF ABORYSTYN, IN WALES.

election was diſcloſed; but it appearing that it was a void election, the Court granted the *mandamus*, and ſaid, it was not ſufficient to ſhew the fact of an election only, but it ought to be ſuch an election as the act directs. The queſtion then will be, Whether this will fall within the ſame reaſon as *Fintazen's Caſe?* The act ſays, that the election made purſuant to this act muſt be the next day after the charter or preſcriptive day. Here it is agreed, that the preſcriptive day is at a court-leet held within one month after *Michaelmas-day*; and it is ſaid that this muſt be computed according to the calendar month, which, according to this computation, will bring the preſcriptive day to the thirtieth of *October*, and the election was had on the thirty-firſt of *October*, the day after. But it is very clear and ſettled, that when the common or ſtatute law ſpeaks of a month generally, without fixing any number of days, or ſaying what ſort of month, it is meant thereby a lunar month (for it is the eccleſiaſtical courts that reckon by calendar months); and then this election will be void, not being had the day next after the preſcriptive day, which is a lunar month after *Michaelmas*, and ſhould have been on the twenty-ninth of *October*. It is likewiſe bad on the ſecond exception, for it does not appear that the perſon who preſided on this election was the neareſt in place and office to the mayor then preſent; it is only ſaid he was one of the neareſt. Therefore I am not ſatiſfied there has been a good election; and I am of opinion that a *mandamus* ought to be granted.

PAGE and WRIGHT, *Juſtices*, were of the ſame opinion.

The *mandamus* was accordingly granted.

Warden *againſt* Sir William Rous.

Caſe 303.

A freeman of *London* is not deprived of his right of voting for common-council-man by not having paid the *orphans tax*, if it is not demanded of him.

A MANDAMUS iſſued to the defendant, an alderman of *London*, ſuggeſting, that the plaintiff was duly choſen a common-council-man for the ward of , in the city of *London*, and commanding him to ſwear the plaintiff in accordingly, or ſhew cauſe, &c.

To this the defendant returned, that the plaintiff was not duly elected into the office of common-council; and upon that an iſſue was joined, and a ſpecial verdict found, *viz.* that this is an antient ward, and has a court of wardmote belonging to it, and nine common-council-men. The return then ſets out the 5. & 6. *Will.* & *Mary*, c. 10. which lays a tax on freemen of *London* and others for raiſing the ſum of eight thouſand pounds *per annum* towards the maintenance of orphans. It alſo ſets out ſeveral clauſes of the 11. *Geo.* 1. c. 18. ſ. 8, 9. the purport of which is, "that "after the firſt day of *June* 1725, the right of election of alder-"men and common-council-men for the ſeveral wards of the city "ſhall belong and appertain to freemen of the city of *London*, being "houſholders paying ſcot and bearing lot, when required, in their "reſpective wards, and to none other whatſoever, provided that

WARREN *againſt* SIR WILLIAM ROUS.

" the houſes of ſuch houſholders be reſpectively of the real value of " ten pounds *per annum* at leaſt, and that ſuch houſholders be the " ſole occupiers of ſuch houſe, and have been actually in the poſ- " ſeſſion of an houſe of ſuch value in the ward where the election " is made by the ſpace of twelve calendar months next before ſuch " election: and for the better aſcertaining what are the rates and " taxes to which ſuch houſholders ought to contribute and pay their " ſcot, the ſame are hereby declared to be a rate to the church, to " the poor, to the ſcavenger, to the orphans, and to the rates in lieu " of or for the watch and ward, and to ſuch other annual rates as the " citizens of *London* inhabiting there ſhall hereafter be liable to, " except the annual aids granted by parliament; and if ſuch houſe- " holder ſhall have paid his ſcot to all the ſaid rates and taxes, or " thirty ſhillings a-year to all or ſome of them, he ſhall be deemed a " perſon paying of ſcot;" that at an election for common-council-men the plaintiff had ſeventy-ſix votes, of which thirty-five had not paid the *orphans tax*, but all the other taxes they had paid. They find, that no rate has been made for raiſing the orphans tax ſince the year 1733; the yearly ſum to be raiſed for the orphans tax had been paid out of the city caſh to the year 1738; and from that time it has not been paid by the City. And conclude, that with theſe thirty-five votes the plaintiff had a majority of the candidates; but they refer the right of theſe voters to the Court.

The queſtion was, Whether a freeman of *London* who has paid all the other taxes except the *orphans tax*, for which no rate has been made ſince the year 1733, ſhall, by his not paying this tax, which is not demanded of him, and which is not in his power to pay, be deprived of voting for a common-council-man?

DENNISON, *for the plaintiff*, argued from the impoſſibility of his being able to pay a tax for which no rate is made, and that the act of 11. *Geo.* 1. muſt be conſtrued to mean only thoſe taxes which are ſubſiſting; and this is not a ſubſiſting one, being never demanded; and likened it to the condition of a bond which is become impoſſible, and ſo the bond ſaved: as where the condition of a bond was to give ſecurity for a certain day as the chamberlain of *London* ſhall appoint, the defendant pleaded that there was no chamberlain of *London* at the day; and held a good excuſe, for it was not in his power to make one.

1. Vent. 184.

NOEL *for the defendant* inſiſted, that this was a ſubſiſting tax impoſed by act of parliament, and which cannot be diſpenſed with by the city of *London*; and the words of the act are expreſs, that the right of election ſhall belong to ſuch as are there deſcribed, paying ſcot and lot, and to none other whatſoever: that the orphans tax is not raiſed, yet it is in the power of a voter to qualify himſelf by paying thirty ſhillings in the whole to all or any of the taxes; which clauſe was added to give thoſe people a liberty of voting, though they had not paid all the taxes, provided they paid thirty ſhillings in the whole to all or any of them; and it is not found that theſe thirty-five voters paid thirty ſhillings in the whole. The act intended to abridge the number of electors, and does not take away any right, but only adds a new qualification, which ought to be complied with, either by paying the taxes there mentioned, or the thirty ſhillings in the whole.

Warden againſt Sir William Rous.

The Court. This caſe can receive no aid from the ſtatute of 5. & 6. *Will. & Mary*, c. 10.; for though the city of *London* might make this a ſubſiſting tax, by making a rate and demanding it properly, yet as they have not done this, it cannot be called a ſubſiſting tax. The ſtatute of 11. *Geo.* 1. c. 18. intended to abridge the number of electors, by confining the right of election to the moſt ſubſtantial, *i. e.* to ſuch only as paid thoſe rates therein-mentioned; but then the act muſt be conſtrued to mean ſuch of them only as are ſubſiſting; for if no rate or demand be made for thoſe taxes, how can they be paid? And as it is not in the voter's power to comply with the firſt part required by the act, he is not put upon performing the alternative of paying thirty ſhillings; for if he pay all the rates in being, he does as much as he is obliged to do by the act; for the alternative extends only to one who has not paid all the rates in being, but has paid thirty ſhillings in the whole; and as no rate is made for this tax, it is a caſe out of the act, and not taken notice of. Therefore they were all of opinion, that theſe thirty-five voters were good.

A peremptory *mandamus* was granted.

Shuttleworth *againſt* Pilkington.

Caſe 304.

An action on a bail-bond for the defendant's appearance to a *teſtatum* on an original. The writ was returnable "in three "weeks from the Feaſt of *St. Michael*, whereſoever our Lord the "king ſhall be in *England*;" and the condition of the bond was, "to appear on the return thereof before the king" generally, without ſaying, "whereſoever he ſhall be in *England*," as the writ is. The defendant pleads 23. *Hen.* 6. c. 10. which directs, "that "no ſheriff ſhall take, or cauſe to be taken, any obligation of any "perſon in their ward by the courſe of law, but by the name of "their office, and on condition written that the ſaid priſoners "ſhall appear on the day contained in the ſaid writ or warrant, "and in ſuch places as the ſaid writs, bills, or warrants, ſhall require;" and then pleads, that the bail-bond was taken *colore officii*, and for eaſe and favour, and not purſuant to the ſtatute. To which there was a demurrer and a joinder.

A ſheriff's bond "to appear before the king" generally, is good, although the writ was "to appear on ſuch a day, "whereſoever, "&c." S. C. 2. Stra. 1155. 1. Term Rep. 240. Tidd's Pract. 106, 107.

Strange, *Solicitor General*, inſiſted *for the defendant*, that this bond was void on account of this *variance* between the return of the writ and the condition of the bond; the former being "to "appear before the king whereſoever he ſhall be in *England*," whereas in the latter it is ſaid only, "to appear before the king," omitting the words "whereſoever he ſhall be in *England*;" and cited *Sawyer v. Mitton* (a), *Tilden v. Weaden* (b), and *Sir M.*

(a) Mich. 12. Geo. 1. in B. R.

(b) Eaſter Term, 1. Geo. 2.

Moore v. *Peter Penthouſe*, in the petty-bag-office, to ſhew, that the legal and cuſtomary forms uſed in the return of writs muſt be kept up, and that to recede from them is fatal.

DENNISON *contra* agreed, that the uſual forms of writs, and their returns, ought to be purſued; but that this was not an objection to the return of the writ, but to the bail-bond taken on a good writ; and he ſaid, that bail-bonds were taken to prevent extortion, and ought not to be ſo ſtrictly conſtrued as they have been, in which no particular form of words are neceſſary; and cited *Cro. Jac.* 286. *Villers* v. *Haſtings*. 2. *Vent.* 237. 2. *Show.* 51. 2. *Levin.* 180. and *Phillips*, *Aſſignee*, &c. v. *Alexander*, *Trinity Term*, 3. & 4. *Geo.* 2. in the exchequer, where a bail-bond was taken on a *quo minus* returnable before the barons of the exchequer at *Weſtminſter*, and the condition of the bond was to appear in the office of pleas in the exchequer at *Weſtminſter*; and the Court held the bail-bond good, though the condition varied from the expreſs words of the return of the writ.'

THE COURT all held, that this variance between the writ and the condition of the bond was not material, for the Court does not require ſuch particular forms in bail-bonds given to the ſheriff. The ſenſe of the writ is, "to appear before the king in his court;" and we muſt underſtand the bond in the ſame ſenſe, to appear in this court, where the king is ſuppoſed to be preſent; and therefore held the bail-bond to be good.

Judgment was given for the plaintiff.

Caſe 305. Talbot *againſt* Hubble and Others.

If the charter of a city give to the juſtices an excluſive juriſdiction, the juſtices for the county cannot interfere.

ACTION OF TRESPASS againſt the defendants for breaking and entering the plaintiff's houſe in *New Sarum*, and carrying away and detaining ſeveral goods mentioned in the declaration, and keeping them till paid the ſum of ſix pounds. The defendants pleaded "not guilty;" and on the trial a ſpecial caſe was made for the opinion of the court of king's bench.

S. C. 2 Stra 1154.
3. Hawk. P. C. 7th edit. ch. 8. ſ. 48.

The caſe ſtates, That the plaintiff is a public-houſe-keeper within the city of *Saliſbury*; that the defendant *Hubble* is an officer of exciſe; that the defendants *Harris* and *Pitts* are juſtices of the peace for the county of *Wilts*, the one reſiding in, another in a cloſe adjoining to, the city of *Saliſbury*; and that the other defendants are *conſtables* for the ſaid city: that the defendant exhibited an information againſt the plaintiff, before the defendants *Harris* and *Pitts*, for having a quantity of run tea concealed in his houſe: that upon this the juſtices condemned the tea, and fined the plaintiff the ſum of ſix pounds, which was the treble value of the tea, and granted their warrant to the other defendants, the conſtables, to levy the ſame; and that they, in purſuance thereof, entered the plaintiff's houſe, took his goods, and detained them till paid the ſaid ſum of ſix pounds: that all the proceedings were regular on this information, if the defendants, the juſtices, have a ſufficient juriſdiction to convict the plaintiff in this caſe for an offence agreed to have been committed within the city of *New Sarum*, for that this city, by ſeveral charters from the crown, has thirteen juſtices of its own, who have power to hear and determine all matters and offences ariſing in the ſaid city; in which charters there are ſeveral excluſive clauſes, whereby the juſtices for the county at large are precluded from intermeddling in any matter ariſing in the city of *Saliſbury*, or within the juriſdiction of the city juſtices: that the juſtices for the city have always held the quarter-ſeſſions there, and that informations relating to the exciſe have been frequently made before the juſtices of the city, where the matter aroſe in that corporation; and that it did not appear that the juſtices for the county had ever exercifed any juriſdiction in the ſaid city for any fact ariſing there, whether it related to the exciſe or otherwiſe: and that it appeared on the oath of the town-clerk, who had been in the office for thirty years, that the county juſtices never intermeddled in city matters; and that he could not find one entry in any of the Books to ſhew they ever had.

The question reſerved for the conſideration of the Court was, Whether the defendants *Harris* and *Pitts*, being juſtices of the peace for the county of *Wilts*, the one reſiding *in*, and the other *near*, the ſaid city of *Saliſbury*, had a legal and proper authority and juriſdiction, under the circumſtances of the preſent caſe, to proceed on the information exhibited before them by the defendant *Hubble* as aforeſaid, for the ſaid offence committed within the ſaid city by the plaintiff, then reſiding within the ſaid city, and to grant their warrant, upon the ſaid information, to levy the penalty within the ſaid city.

The caſe was argued three ſeveral times at the Bar, where theſe four points were principally ſpoke to.

First, Whether the crown can grant an excluſive juriſdiction?

Secondly, Suppoſing the crown can, Whether the ſeveral charters granted to the city of *Saliſbury* do contain ſuch an excluſive juriſdiction?

Thirdly, If the crown have ſuch a power, and the charters do contain ſuch an excluſive clauſe, Whether the ſtatute of 12. *Car.* 2. c. 23. ſ. 31. is a virtual repeal of theſe charters, ſo as to let in the juſtices for the county at large, in any matter relating to the exciſe?

Fourthly, Whether this action of treſpaſs is the proper remedy for the plaintiff? for it was objected, that if the juſtices for the county at large have no juriſdiction within the city of *Saliſbury*, an

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an action on the caſe ought to have been brought againſt them for exerciſing an illegal juriſdiction; and not an action of treſpaſs.

Lee, *Chief Juſtice*, this Term delivered the opinion of the Court, in which he took notice of all the principal arguments at the Bar, and ſtated the caſe as above.

I think the firſt conſideration will be, Whether the charter-juſtices of *New Sarum* have a juriſdiction in their city excluſive of the juſtices for the county of *Wilts*; for if there be no excluſive words in their charter, there is no foundation to ſay that the juſtices for the county of *Wilts* have not a concurrent juriſdiction with the corporation juſtices within the city of *Saliſbury*. And that they have this concurrent juriſdiction appears from *H. H. Pl. Coron. fo.* 47. where it is ſaid, that "if the king by charter grant to a corporation that the mayor and recorder ſhall be juſtices of the peace within the city, whereby they are juſtices in perpetuity by charter, yet, if there are no words of excluſion, the juſtices of peace for the county have a concurrent juriſdiction with the juſtices by charter."

The next point will be, Whether here is an excluſive juriſdiction given by theſe charters to the juſtices of *New Sarum*?

The excluſive clauſes in the ſeveral charters are in almoſt the ſame words (which he ſtated at large), and are to this effect; "That the juſtices of *New Sarum* ſhall have juriſdiction to determine all matters ariſing within their city in as full and ample a manner as the juſtices of the county of *Wilts*, or any other juſtices of the peace of our lord the king, can determine any matters within their reſpective juriſdictions, either by virtue of their commiſſions, or of any act of parliament already or hereafter to be made; and that the juſtices of the peace for the county of *Wilts* ſhall not hereafter intermeddle themſelves, or have any manner of juriſdiction of any cauſes or matters ariſing in the ſaid city of *New Sarum*, or within the cognizance of its juſtices." By this clauſe I apprehend, that the crown has excepted *New Sarum* from the concurrent juriſdiction of the juſtices of the county at large, as abſolutely as if there had been an expreſs clauſe of excluſion in the commiſſion to the county-juſtices commanding them not to intermeddle with any matters ariſing within the city. The clauſe in the charters of *New Sarum* is to empower its juſtices to do not only what the county-juſtices could do by any act of parliament then in being, but alſo what ſuch county-juſtices ſhould be enabled to do by virtue of any ſubſequent act of parliament. And this will be an anſwer to the caſe in *Brooke*, where it was held, that the city of *Briſtol* ſhould not have the cognizance of a plea in an action for maintenance, becauſe their juriſdiction aroſe from a grant of *King Edward the Third*, and the action of maintenance is given by a ſtatute of *Richard the Second*, which is ſubſequent to the grant, and was not *in eſſe* at that time; but there is a *quære* to it by *Brooke*. But the preſent caſe differs; for the charter juſtices are, by expreſs words, to have juriſdiction in all matters ariſing on ſubſequent acts, as well as on acts already in being.

But if it be doubted, Whether the crown has power to grant an excluſive juriſdiction, that will be ſettled by this *Caſe of the Abbot of St. Alban's (a)*, where it is ſaid, that if there is a clauſe of excluſion, the juſtices of the county have no juriſdiction in that corporation, &c. And it is alſo ſaid by READ, *Juſtice*, in that caſe, that an indictment before the county-juſtices, for a matter ariſing within the excluſive juriſdiction, is void, as being *coram non judice*; and the clauſe in the juſtices commiſſions which ſays they are to act *tam infra libertates quàm extra*, means only as to ſuch places where the juſtices of theſe liberties have no expreſs clauſes in their patents to exclude them; for where there are no ſuch excluſive clauſes, there is no doubt but that the county-juſtices will have a concurrent juriſdiction *(b)*. And READ goes on, "and ſince the king wills "that the juſtices for the county at large ſhould not intermeddle, "he has by that divided the juriſdiction of his juſtices, which he "may well do; as in 2. *Inſt.* 71. it is ſaid, the king may well "divide the juriſdiction of his courts." And PHINEUX, *Chief Juſtice*, adds, to what READ has ſaid, "that if a perſon be indicted "before juſtices of a county, who act in a liberty which has its "own juſtices, and a juriſdiction to exclude the county-juſtices, "the indictee may take advantage of this, becauſe it is void, as "being *coram non judice*; though it is objected, that the offence "is only done to the lord of that liberty for an infringement of his "franchiſe." In this caſe it appears, that an exempted juriſdiction is compared to a franchiſe of *retorna brevium*; and THE CHIEF JUSTICE treated it as a thing done *coram non judice*. But I think there is a great difference between them; for though the franchiſe of *retorna brevium* carries an exemption, yet it does not exclude but that the ſheriff may execute writs within it; but then it is a wrong for which the lord of the liberty may have his action; and in ſome caſes the ſheriff may lawfully do it *(c)*; as in the caſe of the king, a *non omittas*, &c.; and the defendant who is ſerved with proceſs by the ſheriff within a liberty ſhall never take advantage of this, but the lord whoſe franchiſe is infringed; and a liberty is always for the benefit of a ſtranger, and not of the defendant *(d)*. But in caſe of an exempted or excluſive juriſdiction, the benefit is for perſons living within that juriſdiction; and I do not know of any caſe that has been determined contrary to that in 20. *Hen.* 7. 6. Indeed HALE, in this caſe, ſays, "it has been doubted whe"ther an indictment at the ſeſſions held by the county-juſtices in "an excluſive juriſdiction be void, or only a contempt in the "juſtices." And ſays alſo, that this matter was moved between the juſtices of the peace for *Surrey* and the borough of *Southwark*, but never reſolved (*a*); but that ſome thought it like the caſe of a bailiwick of a liberty, and a *retorna brevium* granted *ita quod vice-comes non intret*. If a ſheriff execute a writ within the liberty, the execution is good, but the ſheriff is puniſhable for infringing the franchiſe. But in the caſe of *The King v. Grey (b)* it was held by three juſtices, though there was no expreſs opinion, that if a *præcipe* be brought for land lying in the county-palatine of *Lancaſter*, and the *præcipe* iſſue out of the common pleas, and judgment there, ſuch judgment will be void, for the county-palatine is an exempted juriſdiction from the king's courts at *Weſtminſter*, and has itſelf a plenary juriſdiction (*c*). But in the caſe of *retorna brevium* the court that iſſues the proceſs has juriſdiction in the liberty; and when the writ is executed, it is good to all intents and purpoſes againſt the defendant, and the lord is the only perſon who is to take advantage of the irregular execution of the writ, which is a breach of his franchiſe.

(a)

(b) 1. H. H. Pl. Coron. 47. Dalton, 24.

(c) 1. Vent. 406.

(d) 5. Co. 92. b. Semayne's Caſe.

Taking it then that the crown may, and in the preſent caſe has, granted an excluſive juriſdiction to the juſtices of *New Sarum*;

The next queſtion will be, Whether the ſtatute relating to the exciſe within the city of *New Sarum* admits the juriſdiction of thoſe who in other caſes are excluded? And this depends on the 12. *Car.* 2. c. 23. ſ. 31. and 15. *Car.* 2. c. 11. As to the 12. *Car.* 2. the words are, “that all forfeitures and offences againſt the ſaid act ſhall be determined in this manner: thoſe which ariſe within the immediate limits of the chief office in *London* ſhall be determined by the commiſſioners or governors of the exciſe; and all ſuch forfeitures and offences made and committed within all or any other the counties, cities, towns, or places, within this kingdom or dominions thereof, ſhall be heard and determined by any two or more of the juſtices of the peace reſiding near to the place where ſuch forfeiture ſhall be made or offence committed; and in caſe of neglect or refuſal of the juſtices, by the ſub-commiſſioners: and if the party find himſelf aggrieved by the judgment given by the ſub-commiſſioners, he may appeal to the juſtices of the peace at the next quarter-ſeſſions, &c.

It was inſiſted on by the Counſel for the defendants, that the county-juſtices might act in *New Sarum* in this caſe; for all that was required by this act is, that the perſons who are to exerciſe this juriſdiction in exciſe matters be juſtices of the peace, and reſiding near the place where the fact is committed; and that they act as by a particular deſignation of parliament, under a *deſcriptio perſonarum*, without any relation to their juriſdictions as juſtices; and that the ſame power is given to the ſub-commiſſioners under the like deſcription. But upon peruſal of the ſeveral ſtatutes we are all of opinion,

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(*a*) See the caſe of Rex *v.* Sainſbury, 4. Term Rep. 456. S. C. Nolan's Rep. 15. Rex *v.* Morgan, Cald. 156. Blankby *v.* Winſtanley, 3. Term Rep. 279.

(*b*) Clayt. 120.

(*c*) 2. Inſt. 557.

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opinion, that the deſign of the Legiſlature was to veſt the laws of exciſe in the ſeveral juſtices of the ſaid reſpective cities, counties, &c. reſpectively, according to the legal juriſdiction which they exerciſe over other matters which are cognizable by them. This will depend on the ſeveral clauſes in the Exciſe Acts. In the 12. *Car.* 2. c. 23. ſ. 29. there is a clauſe which relates to the farming the exciſe, and enacts, “ that the lord treaſurer, commiſ- “ ſioner, &c. ſhall not agree with any perſon in any of the reſpective “ counties or places of this realm in any other manner than as “ ſhall be directed by the juſtices of the ſaid counties or places, or “ the major part of them, at their quarter-ſeſſions.” Here the direction of farming is confined to the juſtices of the ſaid counties, towns, cities, &c. and the juſtices of that reſpective county or place where the duty ariſes are the perſons meant by the act of parliament.

The next clauſe (ſect. 39.) is that which gives the juriſdiction to puniſh for the forfeitures and offences in the act, and gives the penalty in the preſent caſe. The words are, “ that all forfeitures “ and offences committed within all or any other the towns, coun- “ ties, &c. ſhall be heard and determined by any two or more of “ the juſtices of the peace reſiding near to the place where ſuch “ forfeiture ſhall be made or offence committed.” Here the word *reſpective* is dropped (which is inſerted in the twenty-ninth ſection). But this clauſe muſt have the ſame conſtruction as the others, and muſt mean the reſpective counties and places where the offence was committed; and then the words “ two or more juſtices reſiding “ near to the place” muſt have the ſame conſtruction, *viz.* that they are of the ſame diviſion, and have juriſdiction there. The deſign of the act is plain to fix this juriſdiction in ſome certain ſet of men of that county or place where the fact aroſe, and not where they are barely reſident; and ſome words muſt be ſupplied to execute this intent; for according to the ſtrict words of the act, it gives no more juriſdiction to the juſtices of the county of *Wilts* in a matter *without* their county, than to the juſtices of *Northumberland* or any other juſtices who happen to be reſiding near the place where the offence was committed, which could not be the intent of the Legiſlature; and therefore ſuch conſtruction muſt be made on this act as to confine this juriſdiction to thoſe juſtices who, according to the common and regular method of proceedings by juſtices of the peace, have a juriſdiction in other matters in the place where the offence aroſe; and the clauſe which gives the appeal makes it the ſtronger; for the appeal is given to the juſtices at the next quarter-ſeſſions; and if the juſtices of the county of *Wilts* have a concurrent juriſdiction with the juſtices of *New Sarum*, it will be uncertain to which of the quarter-ſeſſions the appeal muſt be made, for it names neither in particular; and the act would be more particular in the deſcription of the ſeſſions, unleſs it intended to confine the juriſdiction to thoſe juſtices who have the ordinary juriſdiction in the town or place where the offence aroſe; in which

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caſe this clauſe will be ſenſible and plain without any other deſcription. There are ſeveral acts of parliament penned in this way; as 15. *Rich.* 2. c. 2. of forcible entries, which gives power to the juſtices of peace, or any of them; the 18. *Eliz.* c. 3. of baſtardy, which gives power to juſtices near the pariſh-church; the 13. *Car.* 2. c. 10. for killing deer, and does not ſay where the fact is committed; the 13. & 14. *Car.* 2. c. 6. for repairing the highways, ſays, in default thereof any two juſtices living within the pariſh, &c.: in all which caſes, and many others, the juriſdiction is given to the juſtices, but no mention is made that they ſhould be of that county or place where the fact is committed. But yet the rule of conſtruction has always been, *reddendo ſingula ſingulis*, to give the juriſdiction according to the reſpective diviſions or counties of the juſtices; and the 15. *Car.* 2. c. 11. ſhews the Legiſlature had this intention in view, for it directs the juſtices ſhould meet in their reſpective diviſions; from which it follows, they muſt have juriſdiction there. It has been objected to this conſtruction, that there is a clauſe in the 15. *Car.* 2. c. 11. which enacts, "that no commiſſioner, farmer, or ſubcommiſſioner for the exciſe, or common "brewer of ale or beer to ſell, or innkeeper, ſhall have power to "act in or execute as a juſtice of the peace any of the powers, "clauſes, or things, contained in any of the laws made for or con-"cerning the exciſe." And it is ſaid, that in boroughs or towns it is a common thing to have brewers for juſtices; ſo that if all the juſtices in an excluſive juriſdiction ſhould be brewers, &c. there would be a failure of juſtice (*a*). The anſwer I would give to this is, that this defect does not appear in the preſent caſe, nor is there any reaſon to ſuppoſe it here; for it is found, that there are thirteen juſtices for the city of *Saliſbury*; and if it ſhould happen that they were all brewers, &c. the king would in ſuch caſe grant concurrent commiſſions to ſome others to be juſtices in *New Sarum*, *ne populo deficerent in juſtitiâ exhibendâ*, as in *Dalton*, 10.; or there would at leaſt be a remedy by applying to parliament; and therefore there is no occaſion to let in the county-juſtices on this ſuppoſition.

Another objection is made on theſe caſes by the defendants, where an act of parliament has been conſtrued to give juſtices of the peace a power of acting out of their county by way of *deſignatio perſonarum*. But the caſes do not come up to the preſent; for in the caſe of *Cro. Car.* 213 the juſtice acted only in a matter of examination to entitle the plaintiff to an action on the ſtatute of *Winton* on a robbery; and the Court looked on that ſtatute not as giving the juſtice any juriſdiction, but that he acted only under a *deſcriptio perſonarum*; and it was there agreed, that if the act had been for the exerciſing any compulſory juriſdiction, the juſtices could not have acted out of their county. And HALE (*b*) doubts

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(*a*) But now by 24. *Geo.* 2. c. 40. ſ. 22. no perſon or perſons whatſoever being a common brewer of ale or beer, or innkeeper, diſtiller, or other dealer in ſpirituous liquors, ſhall act as a juſtice of the peace.—See 3. Hawk. P. C. 7th edit. ch. 8. ſ 41.

(*b*) Hale's H. P. C. 50.

whether

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whether a juſtice may do a voluntary act out of his juriſdiction, as to take a recognizance out of the county by conſent of the parties; but he lays it down as a general rule, that a compulſory juriſdiction cannot be executed out of the county, ſuch as to compel a perſon out of the county to enter into a recognizance, and to commit him for not doing it: and though, in an act of parliament, no place is mentioned where the juſtice of peace is to exerciſe his authority, yet the law puts this conſtruction on it, that it muſt be in the county where the fact ariſes, and where he has juriſdiction: and this conſtruction muſt neceſſarily be made on the preſent caſe, or elſe it will not appear who is to have juriſdiction; for it was allowed on the ſeveral arguments to be abſurd to veſt this power over the exciſe in any juſtices who were accidentally reſident near the place, and who had otherwiſe no juriſdiction there; as ſuppoſe in the juſtices of *Cumberland* who ſhould happen to live for a time near *Saliſbury*. The ſub-commiſſioners act by a plain deſignation for that particular purpoſe; and ſo would the juſtices at large if they were under the ſame particular deſcription: but then the queſtion is, What is meant by "juſtices reſiding near the place?" And we are of opinion, that by thoſe only are meant who have an ordinary juriſdiction in the place where the fact ariſes.

We are, therefore, **all of opinion**, that the juſtices of *New Sarum* have, by their charter, a power to act there excluſive of the juſtices for the county at large; and that the ſtatutes relating to the exciſe have given to the county-juſtices no power to act in *New Sarum*, or in any excluſive juriſdiction.

Therefore the plaintiff muſt have the *poſtea*, and his judgment.

Roe *againſt* Roe.

Caſe 306.

If a defendant in dower appear and plead *tout temps priſt*, the demandant ſhall have damage from the *teſte* of the original writ of enquiry.

On a writ of dower, the defendant came on the firſt return of the ſummons, and pleaded *tout temps priſt*. Upon which there was a writ of ſeiſin, and a writ of enquiry of damages.

The queſtion was, What damages the demandant was entitled to?

The Court. She is entitled to damages from the *teſte* of the original to the writ of enquiry; ſhe loſes it from the death of her huſband to the *teſte* of the writ: and this has been ſettled in the caſe of *Spiller v. Andrews*, in *Hilary Term*, in the eighth year of *George the Firſt*; and in *Dobſon v. Dobſon*, in *Eaſter Term*, in the ſeventh year of *George the Second*; though *Co. Lit.* 326. is *contra*.

Caſe 307.

Boyer *againſt* Bampton.

If a note of hand be given for a gaming debt, no action will lie thereon by an *indorſee* againſt the *drawer*, although he paid a valuable conſideration for it, and was ignorant of the cauſe for which it was given.

ACTION ON SEVERAL NOTES by an indorſee againſt the drawer, and a ſpecial caſe made at the aſſizes, "That in "*February* 1736 the plaintiff purchaſed theſe notes for a valuable "conſideration, but that they were given by the defendant to one "*Waters* and *Child*, for the ſecuring to them ſeveral ſums of money "which were knowingly advanced and lent by them to the defendant to play with at DICE; and that theſe notes were indorſed "by them to the plaintiff, who was not privy to the conſideration "for which the notes were given."

The queſtion was, Whether the defendant is chargeable with the ſums mentioned in theſe notes on the circumſtances of this caſe?

S. C. 2. Stra. 1155. Salk. 344. Carth. 356. 5. Mod. 175. Comy. 4. 12. Mod. 96. Dougl. 741. 4. Com. Dig. "Juſtices of "Peace" (B. 42.). 4. Bac. Abr. 65. 2. Burr. 1180. 1. Black. Rep. 245. 2. Term Rep. 439.

By the 9. *Anne*, c. 14. it is enacted, "that all notes, bills, "bonds, judgments, mortgages, or other ſecurities or convey- "ances whatſoever, given, granted, &c. where the whole or any part "of the conſideration of ſuch conveyances or ſecurities ſhall be for "any money or other valuable thing whatſoever won by gaming, "or playing at cards, dice, tables, tennis, bowls, or other games, "or by betting on the ſides or hands of ſuch as do game, or for the "reimburſing or repaying any money knowingly lent or advanced "for ſuch gaming or betting as aforeſaid, or lent or advanced at "the time and place of ſuch play to any perſon or perſons ſo "gaming or betting as aforeſaid, or that ſhall, during ſuch play, "ſo play or bet, ſhall be utterly void, fruſtrate, and of none effect, "to all intents and purpoſes whatſoever."

DENNISON and SIR THOMAS ABNEY *for the plaintiff* argued, that though theſe notes, by the ſtatute, would be void between the loſer and the winner who were privy to this tranſaction, yet the plaintiff being an honeſt creditor, without notice of any fraud, and having paid a valuable conſideration for them, ought not to ſuffer by it, but that the notes are good as to him, and by the indorſement are become new notes, and eſpecially as the defendant himſelf is *particeps criminis*, and by this means will be a gainer by his own illegal act; and cited *Cro. Jac.* 32. and *Yelv.* 47. on the ſtatutes of Uſury, where the plaintiff not being privy to the uſurious contract, the ſecurity was held good as to him; 2. *Mod.* 279 and the latter part of the caſe of *Huſſey v. Jacob* (*a*), where it is ſaid, that if the bill had been aſſigned to a ſtranger on a good conſideration, he had not been within the ſtatute, for he had not been privy to the tort, but an honeſt creditor; though the principal caſe is againſt the plaintiff. That in the caſe of a fraudulent conveyance, it is void as to a purchaſor for a valuable conſideration without notice, and as againſt creditors *bona fide* by the ſtatutes of 13. *Eliz.* c. 5. and 27. *Eliz.* c. 4.; but yet the conveyance is very good as againſt the party himſelf, for he is *particeps criminis* (*b*): ſo here the note may be

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(*a*) 1. Salk. 344. Carth. 356. 5. Mod. 170.

(*b*) Vide Cro. Jac. 270. Yelv. 196.

good with reſpect to the plaintiff, who is indorſee for a valuable conſideration, though not as to the winner of the money, who is *particeps criminis*. It would tend to the diſcouragement of trade; for a perſon who pays a valuable conſideration for a note in the courſe of trade, and has it indorſed to him, cannot know on what conſideration that note was originally given.

THE SOLICITOR GENERAL and FLOYD *for the defendant.* The act of parliament was made for the benefit of the loſer, and expreſsly directs, that all ſecurities, &c. given for the repaying any money knowingly lent or advanced to play with, ſhall be void to all intents and purpoſes; and if this note was void in its creation, no indorſement on it afterwards can poſſibly make it good; for if it is void to all intents, it is void to every intent. The caſe of *Huſſey v. Jacob* (*a*) is expreſs in point, and was determined on this foundation, that the contract was illegal and tortious, and not on the plaintiff's being privy to it; which, though mentioned by *Cartew*, is not mentioned as the ground of that judgment. The conſtruction which the plaintiff contends for will entirely evade the ſtatute of gaming; for by indorſing the note to a friend, and getting him to put it in ſuit, by this means a ſecurity will be made good which the act ſays ſhall be "void to all intents and purpoſes;" and cited 1. *Vent.* 253. 2. *Levinz*, 94. The rule is *caveat emptor*, and the plaintiff is not without his remedy, for the indorſor is liable to ſatisfy him for the money he has received of him for the note.

LEE, *Chief Juſtice*. The words of the 9. *Anne*, c. 14. are very ſtrong; and this caſe falls within the expreſs words of it as to making the note itſelf void. It is agreed, that the intention of the act was to take away from the winner and lender of money to be played with any advantage they might receive from the loſer's or any other ſecurity: but then it is ſaid, that theſe ſtrong words of making "all ſuch ſecurities void" are to be confined only to the winner or lender; but I doubt that by this conſtruction ſuch intention cannot be effected, for it is all one as to the winner from whom he receives his money; ſo that his indorſing it to another perſon will be rather an advantage to him. As to the caſes in *Cro. Jac.* 32. and in *Yelv.* 47. they do not come up to the preſent caſe; for the reaſon of the Court's giving judgment in theſe caſes in favour of the ſecurities, was by conſtruing them out of the ſtatutes of Uſury; for they did not conſider it as a bond given to the plaintiff on an uſurious contract, but for a juſt debt as to him; and the uſury was between the defendant and another perſon. So likewiſe was that in 2. *Mod.* 279. determined on the ſame foundation. There is no caſe cited like the preſent but that ſaying of LORD HOLT's in the caſe of *Huſſey v. Jacob*, for the caſe itſelf is not to the purpoſe; and in that caſe HOLT is reported to have ſaid, that if there had been an indorſement on the bill, and an action had been brought by the indorſee, it would be of another conſideration. I have ſeen another ſtatement

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(*a*) Carth. 356.

of that caſe, in which he is reported to have ſaid the ſame thing; but it was very much wondered at; and the caſe of the fraudulent conveyance was mentioned as a ſimilar caſe to that ſaying of Holt's; but I do not ſee how they are alike; for though it is voluntary, yet at law it is a good conveyance, only made bad by the ſtatute as to a purchaſor for a valuable conſideration. But this caſe falls within the expreſs words of the act of parliament, which has made it "void to all intents and purpoſes;" and it would be a very hard conſtruction to determine it contrary to the ſtatute. A conſtruction on either ſide will be attended with inconveniencies, as on the one hand in the caſe of trade, and on the other a contrary conſtruction will entirely evade the act of parliament, and encourage gaming. And I think the inconveniencies on this ſide are the ſtrongeſt. Therefore, as no caſe has been cited to prove the diſtinction that the note ſhall be void as to the winner, and not ſo as to the indorſee, I am of opinion, that the plaintiff cannot recover againſt the defendant on theſe notes; the conſequence of which will be, that the plaintiff muſt pay the coſts of a nonſuit.

Page, *Juſtice*, was of the ſame opinion.

Chapple, *Juſtice*, of the ſame opinion; and ſaid, that he thought the greateſt diſcouragement ought to be given to any ſecurity on account of gaming, for a man who loſes only what money he has about him may not be ruined; but if the giving ſecurities on theſe occaſions be once encouraged, there would be no end to his loſings till he has no more to loſe.

Wright, *Juſtice*, of the ſame opinion; for if the drawer be liable to pay the note to an indorſee, it is not "void to all intents;" and in the caſe of *Cureden v. Leland* (*a*) it was held, that one who ſerved under an indenture without ſtamps could gain nothing by it; for the act ſays, "it ſhall be void to all intents, &c." Here is no room for any conſtruction or diſtinction on this act, for it is expreſs; and if any objections are made, they muſt be made to the act itſelf, for a different conſtruction would entirely evade it.

Judgment for the defendant (*b*).

(*a*) Eaſter Term, 4. *Geo.* 2. 1. Conſt's Poor Laws, 483.

(*b*) See Hincey *v.* Jacob, 5. Mod. 175.

Caſe 308. Heathcott *againſt* Goſlyn.

An affidavit to hold to bail muſt be poſitive and certain.

S. C. 2. Stra. 1157.
See Tidd's Pract. 39, 40, 41.

IT was moved, that the defendant might be obliged to put in ſpecial bail on a *bottomree-bond* taken on the ſhip *Suſſex*. The affidavit on which the writ was taken out was to this effect, "That the "ſum of two thouſand five hundred pounds is due to the plaintiff "from the defendant by bond, as by the ſaid bond appears."

The Counsel *for the plaintiff* offered to verify by affidavit ſome facts concerning the ſhip's being loſt, and to explain this affidavit;

but the reading theſe affidavits was oppoſed by the defendant's Counſel, as alſo the taking ſpecial bail.

The Court. The method is to determine the right of ſpecial bail on that affidavit only which was made before the proceſs taken out, and not to admit of ſupplemental affidavits on either ſide (*a*). It muſt alſo appear, that a ſufficient debt is actually due, which does not appear here except by reference to the bond (*b*), and on the bond nothing appears to be due, for it is due only on a contingency, and it does not appear whether the ſhip is loſt or not.

Therefore it was held, that ſpecial bail ought not to be taken.

(*a*) See 1. Barnes, 66. 2. Barnes, 58. 81. 84. 2. Black. Rep. 840. Turner *v.* Warren, Andr. 70. Emmerſon *v.* Hawkins, 1. Wilſ. 335.

(*b*) Anonymous, 1. Wilſ. 121. Rollin *v.* Mills, 1. Wilſ. 279. Jennings *v.* Martin, 3. Burr. 1447. Rio *v.* Beleſauté, 2. Stra. 1209. Barclay *v.* Hunt, 4. Burr. 1995. Warbeck *v.* Wheeler, Barnes, 100. Kelly *v.* Devereux, Say. 59. Powel *v.* Portherck, 2. Term Rep. 55.

The King *againſt* Nance.

Caſe 309.

If a mayor be choſen on the day preſcribed by 11. *Geo.* 1. c. 4. it is ſufficient to ſwear him in before the preſiding officer as the ſtatute requires, although by the conſtitution of the borough a new mayor is to be preſented at the next court leet, and ſworn in before the town clerk.

INFORMATION, in nature of *quo warranto*, againſt the defendant for illegally exerciſing the office of mayor of *Grampound*, in the county of *Cornwall.*

The defendant, by his plea, ſet out the conſtitution of the borough; that it is a borough by preſcription, and conſiſts of a mayor, eight capital burgeſſes or freemen, and an unlimited number of free burgeſſes or freemen; that the cuſtom is for the mayor, capital burgeſſes, and freemen to meet on *Sunday* next before *Michaelmas-day*, in the town-hall, to chuſe a mayor; and that the capital burgeſſes, or a major part of them, nominate two capital burgeſſes, other than the ſtanding men, to the mayor, who ſtrikes out one of them, and that the remaining capital burgeſſes and the ſtanding men are then put in nomination for the freemen to chuſe one of them mayor for the enſuing year; and then he pleaded, by way of averment, that the ſtanding man is he who was put in nomination the laſt year, but not choſen. The plea then ſet out the fact of this election: " That on *Sunday* next before *Michaelmas*, being the twenty-eighth of *September*, there was no election of a mayor according to the cuſtom; and on *Monday* the twenty-ninth of *September* one *Pierce*, the defendant *Nance*, and one *Moore*, three capital burgeſſes, and a great number of free burgeſſes met to chuſe a mayor, according to the ſtatute; that at that aſſembly no mayor appeared, and that *Pierce*, who was the ſenior capital burgeſs then preſent, and the neareſt in place and office to the mayor, preſided at that aſſembly; that *Pierce* and *Nance*, the defendant, nominated themſelves, and *Pierce* ſtruck off himſelf; and that *Nance*, the defendant, and *Moore*, who was the ſtanding man, were put in nomination to the free burgeſſes, who choſe *Nance* the mayor for the year enſuing; that *Nance* afterwards, "before his admiſſion, took the oaths of office before *Pierce*, who "preſided at the election;" and ſo warrants the defendant's claim to be mayor.

The king's coroner, in his replication, admits the conſtitution as to the manner of election, but ſtates a further part of the cuſtom with regard to the ſwearing, "That the perſon ſo elected "ought to be preſented at the next court leet, before the jury of "the court, which is holden always within one month after "*Michaelmas* yearly, and to be ſworn in and admitted before the "town-clerk or his deputy at ſuch court, in the preſence of the "preceding mayor; and that the defendant *Nance* was not pre- "ſented at the court leet nor ſworn thereat."

Several other iſſues were joined, and a verdict for the defendant in all of them; but as to this part of the replication relating to the preſentment and ſwearing, there was a demurrer and joinder.

The queſtion, on arguing the demurrer, was, Whether as the defendant *Nance* was choſen on the day preſcribed by the ſtatute of 11. *Geo.* 1. c. 4. and not on the preſcriptive day, it is ſufficient that he be ſworn before the preſiding officer at that election, without being preſented at the court leet? or, Whether the preſentment or ſwearing at the court leet be neceſſary after an election purſuant to the act of parliament?

The Counsel *for the defendant* inſiſted, that as this election was on the day preſcribed by the act of parliament, the directions of the act muſt be followed; and that the uſage of the borough, ſuppoſing an election had been on the preſcriptive day, will be entirely out of the caſe. Before this act it was a queſtion, whether the corporation was not diſſolved if the mayor had no power of holding over, and an election had not been made on the preſcriptive or charter day? And to aſſiſt this a writ was framed on the ſtatute of *Weſtminſter the Second*, c. 25. to put them again in motion after this omiſſion; for the mayor's office being then at an end, it was a doubt whether they could act without a head. To remedy theſe inconveniencies the ſtatute of 11. *Geo.* 1. c. 4. was made, which provides for an election after the preſcriptive or charter day. The firſt ſection recites the inconveniencies which often prevented an election on the charter or preſcriptive day, and directs an election on another day, and in what manner and before whom. The ſecond ſection gives *a mandamus* from the king's bench to any officers of the corporation, requiring them to attend ſuch election. The third ſection directs *a mandamus* to the court leet, requiring them to hold a court, in order to ſwear in any mayor or other head officer, if neceſſary. The fourth ſection relates to the ſwearing, and is as follows: "That the mayor, bailiff or bailiffs, or "other chief officer or officers who ſhall be elected purſuant to "the directions of the act, ſhall take the oath or oaths by law re- "quired, at the time of his admiſſion into ſuch office, before ſuch "officer as ſhall preſide at ſuch election, in purſuance of this act, "who is hereby required and authorized to adminiſter ſuch oath or "oaths, and ſhall have the ſame privileges, precedence, powers, "and authorities, in all reſpects, as any mayor, bailiff or bailiffs, "or other chief officer or officers of the ſame city, borough, or "corporation, elected on the days or times fixed by charter or "uſage for that purpoſe, ought to have or enjoy." That this clauſe gives the preſiding officer the ſame power on the ſtatute day of ſwearing the new-elected mayor, &c. as the court leet would have had if the election had been on the charter or preſcriptive day, and is not only directory but compulſory; and that the clauſe which gives *a mandamus* to the leet to hold a court for the ſwearing, is to be conſtrued *reddendo ſingula ſingulis*; that is, when the election is on the preſcriptive day the ſwearing muſt be at the leet, but when on the ſtatute day before the preſiding officer.

It was argued *for the king*, that by the ſwearing before the preſiding officer the lord of the leet will be deprived of his franchiſe without any default in him, but merely by the default of the preceding mayor in not going to an election on the preſcriptive day. The election, it is true, muſt be wholly either according to the uſage, or according to the act of parliament, and ought not be blended one with the other; but the election and the ſwearing are different and independent things; and the one may be according to the ſtatute, and the other by the common law according to the uſage; which the lord of the leet ought not to be deprived of, without ſome default in him. The queſtion therefore will be, Whether the conſtitution being broke into in one inſtance, ought not to be ſo likewiſe in another? And, Whether the preſiding officer on the ſtatute day is to have a greater power or authority than the mayor would have had on the preſcriptive day? He is not complete mayor till ſworn, and by the uſage of the borough he is not to be ſworn till one month after this election; then ſuppoſing the preſiding officer on the ſtatute day is to have a power of ſwearing immediately after the election, this abſurdity will follow, that if there happen to be an election one year according to the ſtatute, and in another year on the preſcriptive day, the former will continue in his office thirteen months and the latter only eleven months. The defendant *Nance* was not ſworn in on the day of election, but at another court before *Pierce*, who preſided at his election; now, though *Pierce* legally preſided on the election day, yet no power is given him to call another court in order to ſwear him in. The third ſection relates to the ſwearing as well as the fourth, and ſays, where there is a contrivance in the lord of the leet in not holding a court, the ſwearing ſhall be by *mandamus* to the lord of the leet, &c. but where there has been no contrivance or default in the lord of the leet, to deprive him of his franchiſe and privilege of ſwearing would be a very hard conſtruction. The mayor loſes all his power by not going to an election on the preſcriptive day; the preſiding officer, who ſupplies his place, has only the ſame power as the mayor would have had on the preſcriptive day. The mayor, it is plain, had not the power to ſwear in, why then ſhall the preſiding officer on the ſtatute day, who only ſupplies the place of the mayor, have a greater authority than the mayor had? The whole tenor of the act is to be taken together, and this conſtruction anſwers all the purpoſes of it, and preſerves the rights of all people who have been guilty of no default.

Lee, *Chief Juſtice*, delivered the opinion of the Court. The queſtion is, Whether the defendant, who has been elected according to the ſtatute, is bound by that part of the cuſtom of this borough of being preſented and ſworn at the court leet? This queſtion depends on the ſtatute 11. *Geo.* 1. c. 4. The intention of the act, by the recital, is to inſtitute a manner of election when there has been a failure on the charter or preſcriptive day, leſt by that means the corporation ſhould be diſſolved. By the firſt clauſe of the ſtatute the perſon preſiding is to do every act belonging to the election, which the mayor might have done on the preſcriptive or charter day. In the third clauſe it is obſervable, that the act takes notice where a nomination and election is neceſſary at the leet, and a proviſion is made for continuing the nomination; but there is no notice taken as to the ſwearing at the leet. The next clauſe is the fourth, which is a general clauſe, and has no ſaving or exception in it, but directs that the ſwearing ſhall be before the preſiding officer. By theſe clauſes it appears there is a manner and form of election and ſwearing preſcribed by this act, and a continuance of the nomination where it is to be at the leet; and as the deſign of the act is to keep up the peace of corporations, it ſupplies the place of the mayor then in being, and has given an election on the next day, and provides for the ſwearing by one general direction, that if the election be at the leet, the ſwearing muſt be there alſo; but there is no direction to continue the ſwearing at the leet, where there is not an election on the charter day; and I take this to be the ſenſe of the act, that where there is an election on the charter or preſcriptive day, if there be any default of the lord of the leet in not holding a court, a *mandamus* may iſſue to oblige him to do it. It has alſo taken care to continue the nomination at the leet; but as to the ſwearing, the clauſe is ſo general, that I think in all inſtances of elections not on the preſcriptive or charter day, the ſwearing muſt be before the preſiding officer. Several objections have been made by the plaintiff, that the act ſays that the preſiding officer ſhall have no more power than the mayor had; and if the mayor has no power to ſwear in, why ſhall the preſiding officer? I agree, as to the election, that the preſiding officer has no more power than the mayor had on the preſcriptive day; but as to the ſwearing, it is expreſsly provided that it ſhall be before the preſiding officer. It is alſo objected, that the lord of the leet being guilty of no default, the act could not intend to deprive him of his franchiſe. To this I anſwer, that the lord of the leet has the ſwearing, if there be an election according to the cuſtom; but if not, it was a doubt before this act whether there could be any election at all, and therefore it is not to be wondered at if the parliament had no regard to ſuch ſwearing, which is not preſerved but on an election according to the cuſtom; for I do not ſee how the jury could preſent a mayor at any other day, or by any other perſons than are impowered to do it by the cuſtom; therefore, as the cuſtom of ſwearing at the leet is part of the cuſtom of the borough, it muſt be confined to an election made in purſuance of the cuſtom. It is alſo ſaid, the defendant was not ſworn on the day of his election but on another day, the twenty-ſecond of *October*, whereas it ſhould be at the time of his election. The day was put in anſwer to the day charged in the information, which is the twenty-ſecond of *October*; but the day of ſwearing in this caſe is not material, if he is ſworn before his admiſſion, as appears by the caſe of *Vaughan v. Lewis*, *Carth.* 227. and here it appears that he was ſworn before he entered upon the office. Upon the whole, the words of the act, as to the ſwearing upon the ſtatute day, are mandatory, and *ſic volo ſic jubeo* is ſufficient in the caſe of an act of parliament; but this is grounded on reaſon, and gives an operation to every clauſe of the act.

Therefore WE ARE ALL OF OPINION, that this ſwearing before the preſiding officer is good; and that there muſt be judgment for the defendant.

Judgment was accordingly given for the defendant.

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The preſiding officer at the election of a mayor, purſuant to 11. *Geo.* 1. c. 4. may alſo be nominated at the ſame time as a candidate for the office; for though he cannot ſwear himſelf in, the Crown may appoint a perſon to perform that ceremony.

IT WAS NOW MOVED *in arreſt of judgment* on behalf of THE CROWN, for that it appears by the defendant's own ſhewing, on the face of the record, that he has no right.

The objection to the defendant's right was, that there was no good nomination; for that *Pierce*, who was *in loco majoris* on the ſtatute day, was not capable of being put in nomination with *Nance*; for he then acted as preſiding officer, and he could not act alſo as a capital burgeſs; and principally for this reaſon, that if *Nance* had been ſtruck off, and *Pierce* and the ſtanding man put in election, and *Pierce* had been choſen mayor by the free burgeſſes, he could not have been ſworn in, for this Court has determined that the ſwearing muſt be before the preſiding officer, and not at the leet; and as *Pierce* was himſelf the preſiding officer, he could not ſwear himſelf in; therefore, for want of a good nomination, the defendant's election muſt be void.

LEE, *Chief Juſtice*, delivered the opinion of the Court. This is a motion in arreſt of judgment on behalf of the Crown, that the defendant may be ſtayed from entering up his judgment, becauſe it appears by his own ſhowing, that he is not well elected for want of a good nomination. And if this appears to be the caſe, the motion will be very proper, notwithſtanding the defendant has had a verdict for him, becauſe it will then appear by his ſhowing that he has no title: ſo is *Carthew*, 370. The cuſtom is agreed on by both ſides, that the major part of the capital burgeſſes are to nominate two of their own body, one of whom is to be ſtruck off, and the other to be put in election with the ſtanding man. The Crown objects to the nomination which has been made in this caſe, becauſe *Pierce*, who is the co-nominee with the defendant, could

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not have been complete mayor if elected, for he could not have ſworn in himſelf: and for another reaſon, that *Pierce* was incapable of both nominating and ſtriking off himſelf. And though no objection be made to *Nance*, the defendant, or to *Pierce*, as being capital burgeſſes, yet it is ſaid the nominees ought to be perſons, either of whom, if elected, would have been capable of being the mayor. As to this, it is immaterial whether *Pierce* could have ſworn himſelf or not, for if there be any means whereby the mayor may be ſworn, that is ſufficient; and if it appeared that there was no perſon in being who could ſwear him in, when elected, the Crown might authorize a perſon to perform that office; for if the ſwearing is not lodged in any particular perſon, it will be in the Crown; ſo that the objection, as to *Pierce*'s being incapable of ſwearing himſelf, will be eaſily anſwered.

A free burgeſs who acts at an election on the ſtatute day in the place of the mayor, does not thereby loſe his right to nominate a candidate.

THE SECOND OBJECTION is to this purpoſe, that *Pierce* acted on the ſtatute day inſtead of the mayor, and as the mayor had no power to nominate on the preſcriptive day, ſo *Pierce*, who is *in loco majoris*, cannot nominate on the ſtatute day. This objection is grounded on a fallacy; for the reaſon why the mayor cannot nominate is, becauſe the nomination is in the capital burgeſſes, and the mayor's power of acting as a capital burgeſs is ſuſpended during the mayoralty; and yet it is true, that *Pierce* has the ſame authority as the mayor on the ſtatute day. Here was a proper aſſembly of capital burgeſſes, and as ſuch *Pierce* nominates, and this power he uſes under the conſtitution; but as preſiding officer he had another right, to ſtrike off as well as to nominate, and this he does by virtue of the act of parliament; whereas he has the other by the conſtitution of the borough.

In what caſe acting *as mayor* and *as capital burgeſs* is not incompatible.

See Milward *v.* Thatcher, 2. Term Rep. 81.

IT WAS THEN SAID, that theſe rights were incompatible. If they had proceeded to an election on the preſcriptive day, theſe rights would have been exerciſed by different perſons, whereas their being at this time exerciſed by the ſame perſon is owing to the default of the mayor, who abſented himſelf; and it would be very hard if *Pierce* ſhould be deprived of his right as a capital burgeſs, becauſe the mayor was wilfully abſent. And as to their being incompatible, the ſame perſon may exerciſe different powers in many caſes; as in a writ of rediſſeiſin the ſheriff is both judge and officer: but there is no need here to go into this, becauſe what *Pierce* has done was under the particular direction of an act of parliament, and occaſioned by the wilful default of the mayor. The directions of the act are very plain, that the rights of every perſon ſhall be preſerved on the ſtatute day, and therefore *Pierce*'s right, as a capital burgeſs, is preſerved to him; and then it enacts, as to the preſiding officer, "that he ſhall have the ſame power as the mayor would have "had on the charter or preſcriptive day;" therefore if the mayor had been preſent, he would have preſided and ſtruck off one; and as *Pierce*'s preſiding aroſe from the default of the mayor, it would be very hard to take away his right as a capital burgeſs; and to put any other conſtruction on it would be to repeal a remedial law, Here a nomination and an election is found, and WE ARE ALL OF OPINION that the nomination is a good one, and that the defendant was well elected on the ſtatute day.

THE KING *againſt* NANNEY.

The rule for arreſting judgment was diſcharged.

Bartlett *againſt* Gawler.

Caſe 310.

If, on proper notice, a party refuſe to produce a deed neceſſary to prove the iſſue, the other party may give parol evidence of its contents.

1. Mod. 94.
5. Mod. 211. 386.
6. Mod. 225. 248.
10. Mod. 42. 74. 108.
Gilb. Law Evid. 4th edit. 96.
Bull. N. P. 228, 254.
Dougl. 594.
3. Term Rep. 151.
Eſpinaſſe Dig. 772.

MOTION FOR A NEW TRIAL on the following caſe:

J. Colebrooke, ſeiſed in fee, mortgaged to *A. M. N.* for one thouſand years; the plaintiff, *Bartlett*, recovered a judgment againſt *Colebrooke*, who afterwards, by leaſe and releaſe, conveyed the inheritance by an abſolute ſale to *A. M. N.* The plaintiff brought a *ſcire facias* againſt the ter-tenants of theſe lands to ſhew cauſe why they ſhould not be taken in execution on this judgment againſt *Colebrooke*. The defendant, *Gawler*, came in and pleaded the mortgage for one thouſand years, which was aſſigned to him, and then prayed judgment, whether the plaintiff ought to have judgment againſt him except for the reverſion. The plaintiff replied, that after the aſſignment of the mortgage to the defendant, *J. Colebrooke*, by leaſe and releaſe of the premiſes, releaſed the fee and inheritance to the defendant, whereby the term of one thouſand years became merged in the inheritance. The defendant rejoined, that *J. Colebrooke* did not releaſe in manner and form, &c.; and upon that iſſue was joined.

To prove theſe releaſes, the plaintiff gave the defendant proper notices to produce them on the trial, and offered to prove that the deeds were in the defendant's cuſtody, and likewiſe offered to prove them by one of the ſubſcribing witneſſes, who ſaw the execution of them; but the defendant, though called upon, refuſed to produce the releaſe; and this evidence was diſallowed by the Judge who tried the cauſe, as it was only parol evidence, and as the defendant was purchaſer for a valuable conſideration. Whereupon judgment was given for the defendant; and for this reaſon the plaintiff moved for a new trial.

The queſtion was, As the defendant had refuſed to produce the deed, whether the plaintiff might give parol evidence of it?

The plaintiff's Counſel cited *Eggleton v. Speke* (*a*), *Wyemark's Caſe* (*b*), and *Dr. Leyfield's Caſe* (*c*), that it falls within the rule of law, that the beſt evidence is to be given that the nature of the caſe will admit of, and as the defendant is proved to have the cuſtody of the deed, the plaintiff can get no other evidence of it; if the plaintiff give a falſe account of it, the defendant may produce the deed and ſet it right.

(*a*) Carth. 20. (*b*) 5. Co. 74. (*c*) 10. Co. 93.

BARTLETT *againſt* CAWLEY.

IT WAS ARGUED *for the defendant*, that this is calling upon a man to give evidence againſt himſelf, and would introduce perjury. And a difference was taken where a perſon has a right to a deed, and the other party gets the poſſeſſion of it tortiouſly, there the other may give parol evidence of it; and cited 42. *Edw.* 3. c. 18. which is in 5. *Co.* 75. *a.*

LEE, *Chief Juſtice.* It is not material to determine what effect this releaſe would have were it produced; the plaintiff ſays it would operate as a merger of the term, and let in the judgment creditor on the eſtate in fee. The iſſue was, Whether there was ſuch a releaſe or not? And the queſtion is, Whether on this proof parol evidence of it ought to have been received? I think it falls within the general rule, that the beſt evidence is to be received which from the nature of the thing can be given. The reaſon for giving the other party notice to produce the deed before parol evidence can be given of it, is, that he may be apprized of your evidence, and be prepared to contradict you if you give a falſe evidence of it, by producing the deed in court, which will prevent the danger of perjury. The plaintiff has a ſuppoſed intereſt in it, and he thinks he ſhall be able to prove his iſſue by it, and he need not have ſuch an intereſt as a party or privy has; and I think this evidence ought to have been received.

The OTHER JUDGES were of the ſame opinion.

WRIGHT, *Juſtice*, cited a caſe of *Pyne v. Lady Seymour*, *Eaſter Term*, in the ninth year of *Queen Anne*, before LORD PARKER.

Rule abſolute for a new trial.

TRINITY TERM,

The Fourteenth of George the Second;

IN

The Common Pleas.

Sir John Willes, *Knt. Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir John Forteſcue Aland, *Knt.* *Juſtices.*
Sir William Forteſcue, *Knt.*
Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Johnſton *againſt* Wilſon.

Caſe 311.

If ſeveral perſons, being *ſeiſed in common*, enter into an arbitration bond, for the purpoſe of *partition* being made among them, and the arbitrators allot ſeveral parts to ſeveral perſons to be held by them in *ſeveralty*, but do not direct any deeds to be executed to carry the *partition* into effect, and to veſt the reſpective ſhares of the lands in the ſeveral perſons to whom they were allotted, THE AWARD is bad, for want of a *complete partition* being made.—S. C. 16. Viner, 221. *notis.*

WILLES, *Chief Juſtice*, delivered the opinion of the Court in this caſe as follows:

This was a motion in arreſt of judgment after an interlocutory judgment by default, and a writ of enquiry of damages executed, in an action of covenant founded on a deed made the twenty-fourth of *February* 1737, not between the plaintiff and the defendant ſolely, but others were likewiſe parties to it; and recites the occaſion of the deed to be a large common at *Seaton* in *Durham*, which the proprietors had a mind to incloſe and improve, and that partition ſhould be made as arbitrators ſhould think proper, and that the ſea bank ſhould be kept up as they ſhould direct. They firſt covenant mutually for their own acts only with each other, and not for the acts of any other, and therefore they are as ſeveral and diſtinct as the law will allow and the nature of the thing permit; and afterwards they go to particular covenants, that they will direct five arbitrators, and that the award is to be made the firſt of *October* 1738; and then comes this clauſe, that they would agree to all reaſonable things agreed on by the arbitrators towards aſcertaining the diviſions and ſetting out the reſpective portions of each, and that the arbitrators may make ſuch partition as they in their judgment thought fit, and direct ſuch deeds as are neceſſary to compleat ſuch partition (this is part of the covenants); and when the partition is made, they are to hold in ſeveralty; and they covenant that the ſea bank ſhould be kept up as the arbitrators think fit, and that the owners of the lands ſhall pay what the arbitrators think reaſonable, and the proportion for ſurveying the land and eſtabliſhing the award, into the hands of *Johnſton* and two others, and bind themſelves for performance in three hundred pounds. The award was made within the time, *viz.* in *September*, and by the award they have made partition of the greateſt part, and the reſt, which was undivided by the arbitrators, was to be held in common; and they allotted to *Wilſon*, *Whitehead*, and *Doe*, twenty-two acres in lieu of their eſtate in the common, and that they ſhould maintain fences, &c. which divided them from the reſt. Then they award as to the ſea bank that it ſhould be kept up as before, except that now they ſhould contribute towards it according to their allotted ſhares, except *Knakenby*, who is now to pay nothing, the ſea not reaching his land; and then they award thirteen acres to *Johnſton*, and that he repairs, &c. as before; and then they award that they ſhall pay their proportion for eſtabliſhing the award.

The plaintiff avers, not that he has performed the covenants, but that he has performed his part of the award, and then aſſigns theſe breaches: FIRST, That the defendant has not made his fences; SECONDLY, That he has not paid his proportion of the money for the repair of the ſea bank; and theſe two he has laid as contrary to the award, and not as breaches of the covenants; and, THIRDLY, That he did not pay his ſhare of the expence of the award and ſurveying, and this is laid as being againſt the covenant; and though the firſt two breaches which are laid againſt the award may not be good, yet the third may ſtand; and on the firſt two breaches the plaintiff cannot have judgment.

The objections to it are two: FIRST, That the award is void; and, SECONDLY, If there be any collateral breaches aſſigned on which this action may be brought, yet all the parties ſhould have joined in the action.

TO THE FIRST, If the award be void, all covenants which are dependant on the award are ſo too; if the deed which contains the covenants be void, the bond to perform thoſe covenants will be void alſo, for the foundation of all fails, and then every thing built on it muſt fall; but if they be independent collateral covenants, they may ſtand though the award falls (*a*). The principal reaſon why this is void is, that all things to be done are relative to the firſt partition; and if no partition be made, all dependant on it muſt drop; and here the arbitrators have not made a good partition, becauſe they have aſſigned no deeds of diviſion nor proper aſſurances. On the other ſide they cited caſes to ſhew how partition might be made without deed, and for that reaſon that this was a compleat diviſion, *Litt.* ſ. 244.; but this is not a ſufficient proof, for *Littleton* ſays only between parceners, which will not hold with reſpect to tenants in common and joint-tenants,

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(*a*) 1. Sid. 309. 1. Lev. 45.

and

JOHNSTON *againſt* WILSON.

and ſo *Coke*, 1. *Inſt.* 169. explains it, for he ſays "a partition by "parol between tenants in common, if executed by livery, is good." Theſe are plainly tenants in common, and this award is not good without deeds executed; and as before the ſtatute of Frauds a feoffment was not good without livery, the ſame reaſon will hold ſtill; ſo now no confirmation though by livery, if without deed, is good; here proper conveyances ſhould be executed, and as they have directed none, the award is incomplete and void. There was another anſwer attempted to be given, *viz.* that the award may be good in part and bad in part; but to that I anſwer, It is true it may be ſo; but FIRST, This matter is the whole thing ſubmitted; and, SECONDLY, The firſt two breaches depend on this part of the award: and if the award be bad, there can be no judgment for the firſt two breaches; for if the ſeveral parts be not well allotted, the plaintiff can have no better title than he had before the award; and the ſecond breach ſeems as little ſupported, though at firſt I thought otherwiſe: It is for not paying his proportion for repairs purſuant to the award, becauſe one is exempted from paying a proportion, which muſt be if the partition ſtand, but ſince it does not that falls alſo. But the third breach is on another foot; it is for a breach of the covenant which is collateral to the award; it is a covenant to pay a proportion of the previous charges of making the award, and whether the award is good or not he is bound to pay his equal ſhare; and ſo theſe covenants to do that particular bring us back to the caſes cited, which prove, that though the dependant covenants be void, yet a collateral one will ſtand; and this we think a collateral covenant. We ſhould think this would have been ſufficient, if there were no other objection but to the award; but there is another objection, which, if good, will go to this point, *viz.* that it is a joint covenant becauſe they have joint intereſt; for the covenant cannot alter the nature of the eſtate, and then they ſhould join in the action, as 5. *Co.* 186. *Skin.* 401. *Comb.* 315. 1. *Saund.* 153. But I anſwer, that this objection depends on their having a joint intereſt; but here they have ſeveral intereſts and are tenants in common, and then they may covenant ſeverally, which puts an end to the objection: and it is not like the caſe in *Carth.* 97. where it is ſaid that damages may twice be recovered, for the jury can give no damages but what this particular man has ſuſtained, ſo that there is no ſufficient reaſon to arreſt judgment. When I was before ready to give judgment I conceived two doubts: FIRST, That the plaintiff has not ſhewn that he has ſuſtained any damages; and SECONDLY, That he has not averred that he has performed his covenants. But for the firſt, the jury on the inqueſt have found that he did ſuffer damages, and ſo it muſt be taken for granted; and the defendant has admitted it by letting judgment paſs by default. And to the ſecond the diſtinction is, that where there are mutual covenants not depending on each other, the plaintiff, in an action of covenant, need not aver that he has performed his part. But where the mutual covenants have a de-

pendance

JOHNSTON *againſt* WALDEN.

dance on each other, as where one is a conſideration for the other, there you muſt aver performance on your part, as 1. Brow. 249. So that the firſt two breaches muſt be releaſed, and judgment taken out for the laſt.

Caſe 312. Carver *againſt* James.

If to an action as executor, on promiſes made to the *teſtator*, the defendant plead *non aſſumpſit* and the *ſtatute of Limitations*; A REPLICATION that the teſtator ſued on a writ of privilege, and that the cauſe of action aroſe within ſix years before the writ purchaſed, is bad.

THE PLAINTIFF brought an action on the caſe, as executor of *B. Carver*, on many promiſes made to the teſtator in his lifetime. The defendant pleaded two pleas: FIRST, *Non aſſumpſit*; and SECONDLY, That the cauſe of action did not ariſe within ſix years. The plaintiff replied very particularly, *viz.* that the teſtator ſued a *writ of privilege* (it is not laid to be delivered to the ſheriff, but that the ſheriff did not return it), and continued it until the teſtator's death by proper continuances; he died the twenty-eighth of *June* 1737; and that afterwards, in *Trinity Term*, in the eleventh and twelfth year of *George the Second*, he ſued *a capias* againſt the defendant, which was within a year after the teſtator's death; and the defendant appeared; and the plaintiff declares againſt him, and then ſays the cauſe of action aroſe within ſix years before the firſt writ of privilege purchaſed. On this the defendant demurred for want of ſufficient return to the writ; and though only one cauſe of demurrer was aſſigned, there were four taken;

FIRST, That the writ of privilege was bad, becauſe not returnable on a day certain; and if this be bad, all the continuances will be void.

SECONDLY, The writ was never returned; and then alſo all the continuances built on it muſt fail.

THIRDLY, A writ taken out within a year after the teſtator's death is not good and well ſet out; for an original ſhould be ſet forth, and not *a capias* only.

FOURTHLY, That it ſhould be taken out as executor to *B. Carver*.

WILLES, *Chief Juſtice*, delivered the opinion of the Court.—I chuſe to begin with THE THIRD and FOURTH OBJECTIONS, becauſe though we all agree that the replication is bad, yet we differ in our reaſons; and in theſe two objections WE ALL AGREE, that they are of no force: for firſt *a capias* is ſufficient without an *original*, being the courſe not to take out an original unleſs the party be drove to it, as the *latitat* in the king's bench is ſufficient to take a cauſe out of the ſtatute without a *Bill of Middleſex* (a); and we are juſtified in this by ſome adjudged caſes: In the caſe of *Haliſter v. Woolſtons* (b), from a faithful reporter, it is held, that *a latitat* is not the firſt proceſs, but pre-ſuppoſes a *Bill of Mid-*

(a) Carth. 233. 2. Sid. 55.

(b) Easter Term, 9. *Geo.* 1.

dleſex; and in *Deathbridge's Caſe* (a) it was adjudged, that *a capias* was ſufficient without ſetting out the original; and to keep pace with the court of king's bench we judge it to be ſufficient here, the reaſon in both courts being the ſame; and we all agree that this *capias* is ſufficient.

We alſo agree in THE FOURTH, that it is plain it was taken out as executor.

In the other two there is a ſmall variety, for we all think judgment ſhould be for the defendant, becauſe the foundation fails, viz. that the writ of privilege is not ſufficient, nor the continuances, becauſe the return ought to be on a certain day; but whether it be void, or voidable only, we are not agreed. But, SECONDLY, As to the queſtion, Whether it ought to be returned? the caſe in *Lutw.* 256. is, that it is ſufficient without a return; but there is a diſtinction there which is not in this caſe, for there it does not appear whether or no there was a return, for they ſaid they would intend it was returned; which intendment cannot be here, for it is expreſsly alledged *vicecomes non miſit breve.* And in another caſe in *Lutw.* 260. it is ſaid, that caſe appeared by a manuſcript of *Lawley*'s to have been reverſed in parliament in 1702, and that it ſhould be ſet forth that it was returned. And in *Lutw.* 280. in the caſe of *Green v. Revils* (b), the ſame point is adjudged; and all theſe caſes ſeem to be founded on *Spencer's Caſe* (c), the reaſons of which caſe ſeem to be the meaſure of the judgment in the king's bench in the caſe of *Kinſey v. Hayward* (d); and after ſo ſolemn an adjudication we ſhould conform our opinions to ſuch adjudications. For my part, I ſhould be of opinion that the writ ſhould be returned, as a foundation to ſupport the continuances, which would give the parties notice. We all think the firſt proceſs not ſufficient to ſupport the ſubſequent continuances; but if the firſt proceſs be right, you may continue it down during the whole ſix years by *vicecomes non miſit breve.*

(a) Michaelmas Term, 3. *Geo.* 2.

(b) Salk. 421. S. C. ante, 12.

(c) 6. Co. 10.

(d) 1. Lut. 256. New Lutw. 80. 1. Ld. Ray. 432. Ray. Ent. 328.

Bradford *againſt* Brien.

Caſe 313.

THE PLAINTIFF brought an action of debt on an arbitration bond, bearing date the thirtieth of *July* 1739, and, on *oyer*, the condition appeared to be, "to abide by the award of *E. E.* in "all actions, ſuits, controverſies and demands, ſo as the ſaid award "be made and ready to be delivered to the parties before the eighth "of *Auguſt* following."

An award which excepts part of a matter in diſpute, and leaves the party to proſecute his right therein at law, is bad.

6. Mod. 232.
Godb. 276.
1. Bar. K. B. 463.
2. Ld. Ray. 961.
2. Stra. 1024. 1. Burr. 274. and Kyd on Awards, 140. to 146.

The defendant pleaded, that no award was made.

The plaintiff replied, that there was an award made and ready to be delivered before the eighth of *Auguſt* following, and ſets forth the award; and that the arbitrators awarded, "that all actions, "ſuits, controverſies, &c. before the thirtieth of *July* 1739, ſhould "ceaſe for ever; and that before the *October* following the defendant ſhould pay to the plaintiff fourteen pounds ſixteen "ſhillings and ſixpence; and that the ſixteen ſhillings and ſixpence "ſhould be in full for all tithes; and that the parties ſhould, by "deed, releaſe to each other all demands, &c." and lays the breach in non-payment of the fourteen pounds ſixteen ſhillings and ſixpence.

The defendant rejoined, that in the award there is an exception of all tithe calves, and that the plaintiff ſhould be at liberty to proſecute his right to tithe calves at law, if he had any right thereto.

The plaintiff, ſtating by proteſtation that tithe calves were not excepted, demurred. The defendant joined in demurrer.

Willes, *Chief Juſtice*, delivered the opinion of three of the Judges, *viz.* his own opinion, and the opinions of Parker, *Juſtice*, and William Fortescue, *Juſtice*; Fortescue Aland, *Juſtice*, doubting and being abſent.—There is but one queſtion in this caſe, which is, Whether the award be good or not? And there is but one objection to it, *viz.* that "all matters in "diſpute" are ſubmitted, and yet all matters in diſpute are not determined, the tithe of calves being excepted. The rule, as it is laid down in the Books, is, that when the ſubmiſſion is conditional, namely, with an *ita quod* an award be made of the premiſes, the award muſt be final as to all matters within the ſubmiſſion, of which the arbitrators have notice, and that it cannot be good in part and bad in part (*a*). So that it is now ſettled, that the conditional words will make the award void, if it do not extend to, and is final in, all matters within the ſubmiſſion; and in the preſent caſe the arbitrators take notice of a difference ſubſiſting between them for tithe of calves. The words in the ſubmiſſion in this caſe are, "ſo as the ſaid award," and does not ſay "of the "premiſes; but the words in *Cro. Eliz.* are "the ſame award," which, in my opinion, does not differ from this; but the caſe in *Lutwych* has the ſame words which are uſed here, and is an authority in point. For my own part, I would carry this matter as far as any court has gone before me; and if it were a new caſe, though there were not words of condition in the ſubmiſſion, I ſhould incline to make an award which was not final in all the things ſubmitted, intirely void; for the parties otherwiſe have not the benefit they propoſed by the award. This, no doubt, is a conditional award, and for that reaſon is intirely void. But as my *Brother* Fortescue Aland is not here, and has ſome doubts in this caſe, it will be proper to inform you of them. What he went upon was, that it was a final award at the beginning, and therefore the exception which followed was void, and for his opinion he quoted 6. *Mod.* 34. *Salk.* 74.; but that caſe differs in two reſpects

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(*a*) Cro. Eliz. 839. Cro. Jac. 400. 355. 1. Lutw. 550.

Bradford *againſt* **Brier.**

from this : First, This award does not direct that this ſuit ſhall ceaſe, but that the plaintiff ſhall be at liberty to proſecute his right to the tithe calves at law; but the award in that caſe ſays, that "all ſuits between the parties ſhall ceaſe:" And, secondly, In that caſe the words are "ſuits now depending," which are not in the preſent caſe. One thing which ſtuck a little with me was, that the plaintiff agreed that he ſhould be at liberty to ſue at law for the tithe calves, and that the defendant agreed to it too, which may ſeem to take it out of the award, for *Conſenſus tollit errorem*. But two queſtions ariſe, which anſwer that doubt: First, Whether ſuch an agreement can be admitted? and, secondly, Whether ſuch an agreement be ſufficient to alter the firſt ſubmiſſion? It is a rule, that all matters of fact well pleaded are allowed by the demurrer, and though the plaintiff endeavour by his *proteſtation* not to be concluded, it ſignifies nothing; but the defendant confeſſes only there was ſuch an award, in which the arbitrators ſay ſo and ſo, but not that what they ſay was true. And, secondly, The firſt ſubmiſſion was under hand and ſeal, but this agreement was not, and therefore cannot defeat the firſt ſubmiſſion. On the whole, if the award is void, the defendant is in the right to ſay there is no award; and therefore judgment muſt be for him.

MICHAELMAS TERM,

The Fourteenth of George the Second,

IN

The Common Pleas.

Sir John Willes, *Knt. Chief Juſtice.*
Sir Parker, *Knt.*
Sir John Forteſcue Aland, *Knt.*
Sir William Forteſcue, *Knt.* } *Juſtices.*
Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Peachy *againſt* Oſbaldiſton.

Caſe 314.

ON AN ACTION on a promiſſory note againſt the defendant as indorſor to the plaintiff, the following caſe was made at the aſſizes:—The note was drawn in *October* 1735, by one *F. S.* payable in *January* following, for two hundred pounds. In *October* the defendant agreed with the plaintiff that he ſhould diſcount the note, for which he paid the ſum of four guineas. Afterwards, on the twenty-eighth of *January*, when the note became payable, the defendant offered the plaintiff eight guineas for the forbearance of the payment for ſix months, but the plaintiff inſiſted on ten guineas, which the defendant was obliged to pay. It was proved at the trial that ten pounds *per cent.* was the uſual diſcount of notes to goldſmiths and others in the City. It was alſo proved, that in order to ſmother the appearance of uſury, the defendant gave the plaintiff a freſh promiſſory note dated on the twenty-fifth *January* payable in ſix months, that it might not be ſaid to be ſo much money advanced on one note.

It is uſury to take more than legal intereſt by way of diſcount.

3. Keb. 259.
1. Vent. 253.
Cro. Car. 283.
4. Leon. 43.
2. Leon. 38.
Salk. 344.
2. Stra. 1249.
and ſee 2. Hawk. P. C. c. 82. where all the caſes on this ſubject are collected.

The queſtion in this caſe was, Whether this is an uſurious contract or agreement, within the 12. *Ann.* c. 16. ſo as to make the note void?

Peachy *againſt* Osbaldiston.

The words of the ſtatute are, "That if any perſon take, either "directly or indirectly, more than the ſum of five pounds for the "forbearance of payment of one hundred pounds for the ſpace of "one year, and ſo in proportion for any leſs or greater time, ſuch "contract, agreement, &c. ſhall be abſolutely void."

Willes, *Chief Juſtice.* This is plainly within the words of the act in two particulars, though in the firſt place they have endeavoured to evade it by drawing a freſh note, yet the words "directly or indirectly" clearly comprehend it; and in the next place, it being for forbearance of payment, it is expreſsly within the words of it. There is no occaſion at preſent to take into conſideration the matter of diſcount; but it would be very extraordinary if it ſhould not come within the ſtatute, and by that means the force of the act would be intirely taken away; for a uſurer has nothing to do but get a fictitious note drawn and indorſed, upon which he may diſcount what ſum he pleaſes at an exorbitant intereſt.

The reſt of the Judges were of the ſame opinion.

Judgment was given for the defendant.

MICHAELMAS TERM,

The Fourteenth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt. Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
Sir William Chapple, *Knt.*
Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

The King *againſt* Dr. Bland, Provoſt of Eton. Caſe 315.

A *mandamus* lies to the provoſt of a college to compel him to affix the college-ſeal to a preſentation by the College.

ON RULE to ſhew cauſe why a *mandamus* ſhould not iſſue to *Dr. Bland*, provoſt of *Eton College*, to affix the college-ſeal to the preſentation of one *Parſons* to a college-living, being nominated thereto by a majority of the fellows; the provoſt and one fellow being for another perſon, the provoſt inſiſted, that he had a negative upon the fellows, and therefore without his conſent a majority of the fellows could not nominate any one.

But the principal queſtion now was, Whether a *mandamus* could be properly iſſued in this caſe?

THE SOLICITOR-GENERAL inſiſted, that this was an improper matter for a *mandamus*. This is of the ſame nature as a private advowſon, and has the ſame rules and laws to govern it, and to which a *mandamus* was never granted. If the provoſt, &c. do not agree and preſent ſome perſon within the time limited by law, it will lapſe to the biſhop, which will prevent any inconvenience to the pariſh being without a parſon for that time any more than in the common caſe. In the caſe of *Clarke*, in *Michaelmas Term*, in the twelfth year of *George the Second*, where a *mandamus* was to elect him a prebendary, he had a freehold in the office, and the act to be done to complete it was only a miniſterial act, *viz.* inſtalment: But here is as yet no right in the plaintiff.

The King *againſt* Dr. Bland, Provoſt of Eton.

Hollings *contra.* This is a proper matter for a *mandamus*, it being to oblige a provoſt to execute a truſt. A *mandamus* has iſſued in the caſe of a ſexton (*a*), a pariſh-clerk (*b*), and a ſchoolmaſter (*c*). A *mandamus* has been granted to admit a deputy-regiſter (*d*). Here the act of putting the ſeal is miniſterial, and to complete a particular act already done in part, and is not to elect a perſon into the living, but to preſent one already nominated (*e*). It is a matter proper for examination, and there ought to be a return made to it, when it will come on fully (*f*). Beſides, the plaintiff has no other way of proceeding to remedy himſelf, for the viſitor has nothing to do with him, he not being anyway concerned in the college.

Lee, *Chief Juſtice.* Here has been at leaſt the appearance of an election; and there are many queſtions that will ariſe upon the ſtatutes of the college, and alſo upon the ſtatute 33. *Hen.* 8. Whether that takes away a negative in all caſes? and therefore there is a very good reaſon for the Court's interpoſing and granting the *mandamus*. In the caſe of *St. John's College* (*g*) it was ſaid by Holt, that if there is a viſitor, the Court will not interpoſe in a caſe where the local ſtatutes of the College are only in diſpute. But when the public laws of the kingdom are diſobeyed, they will always take notice of it, and grant the *mandamus*. *Dr. Bland* will have the ſame benefit and advantage in controverting this matter upon the return of this writ, as he has now. I do not ſee any difference between this and the *Biſhop of Saliſbury's Caſe* (*h*), where the Court ſaid, that if any right was ſhewn they would grant the *mandamus*, and have a return made, without determining the matter of right whether a peremptory *mandamus* will lie or not; which I ſhall not do now. But I think a *mandamus* ought to go.

Page, *Juſtice*, was of the ſame opinion.

Chapple, *Juſtice.* It does not appear to me, that if the Court ſhould deny this *mandamus*, the plaintiff has any remedy at all.

A *mandamus* was accordingly granted to *Dr. Bland* (*i*).

(*a*) Raym. 211. 1. Vent. 143. 153. 2. Lev. 18. March, 101.

(*b*) 2. Roll. Abr. 234.

(*c*) Ray. 12. 1. Sid. 40. Stra. 58.

(*d*) Rex *v.* Dr. Ward, Michaelmas Term, 4. *Geo.* 2.

(*e*) See Cowper, 377.

(*f*) *Mandamus* to reſtore Dr. Bentley, Hilary Term, 9. *Geo.* 2. 2. Stra. 912. Biſhop of Litchfield, Michaelmas Term, 7. *Geo.* 2. 2. Stra. 1023.—Vincent, Biſhop of London.—To elect a Lecturer of St. Dunſtan's, Michaelmas Term, 4. *Anne.* Oakquib.—Trinity Term, 13. & 14. *Geo.* 2. The King *v.* Dr. Whaley, *mandamus* to admit one fellow of a college, 2. Stra. 1139.

(*g*) Rex *v.* St. John's College, Cambridge, 4. Mod. 241.

(*h*) See Rex *v.* Baker, 3. Burr. 1265. and 1. Black. Rep. 352. 552. Cowp. 378.

(*i*) See Rex *v.* Vice-Chancellor of Cambridge, where a *mandamus* was iſſued to the keepers of the common ſeal of the Univerſity, commanding them to put it to the appointment of high ſteward, 3. Burr. Rep. 1647.—See alſo Rex *v.* Dr. Windham, where a *mandamus* was granted to compel the warden of Wadham College to affix the common ſeal of the College to an anſwer of the fellows, &c. in chancery, contrary to his own ſeparate anſwer put in. Cowp. 377.

Marlow

Marlow *againſt* Forbes. Caſe 316.

BY the 5 *Geo.* 2. c. 30. bankrupts are to be examined in forty-two days after the commiſſion iſſues, or in ſuch further time as ſhall, on petition, be allowed him by the chancellor; during which time the perſon of ſuch bankrupt is to be free from arreſts. There is alſo another clauſe which obliges the bankrupt to attend the aſſignees after that time, upon notice in writing. But it is not then ſaid that his perſon ſhall be free from any arreſt.

A bankrupt voluntarily attending the commiſſioners on the parol requeſt of the aſſignees, after the forty-two days are expired, is not protected from arreſt.

Lex Mer. 538.
1. Atk. 238.
Cowp. 157.
Cooke's B. L. 142, 143.

The defendant had a commiſſion iſſued againſt him, and had given his proper attendances within the time allowed by the act and by the chancellor purſuant to the act. He was afterwards ordered by one of the aſſignees to attend again for further examination, but not by any notice in writing; which he accordingly did, and on ſuch attendance was arreſted on a promiſſory note given to the plaintiff's father, who was an aſſignee, and by him indorſed to his ſon the plaintiff.

The defendant had never obtained any certificate from his creditors; and it was proved, that the note was indorſed before the commiſſion iſſued.

On motion to diſcharge the defendant from priſon, on his filing a common appearance,

The queſtion was, Whether a bankrupt thus attending the aſſignees after the forty-two days and the advanced time allowed by the chancellor, and without having a notice in writing, ſo that ſtrictly he was not obliged to attend, could be legally arreſted?

Lee, *Chief Juſtice.* I do not ſee how this defendant can be diſcharged. There are three clauſes in the act relating to his attendance: First, He is to attend within forty-two days: secondly, or within ſuch time as the chancellor ſhall allow him further: and thirdly, That after this he ſhall attend the aſſignees for further examination upon notice in writing being given him. Now in the two firſt caſes it is particularly ordered, that during ſuch attendance his perſon ſhall be free from arreſts; but in the other clauſe there is no ſuch thing ſaid. Beſides, by the latter clauſe he has no need to attend unleſs he has a notice given him in writing, which the defendant had not; and if he will voluntarily attend without any compulſion, if he is arreſted it is his own fault, and he cannot now be diſcharged.

Page, *Juſtice*, of the ſame opinion.

Chapple, *Juſtice.* I think there is no reaſon to extend this act to the prejudice of the creditor any further than the ſtrict words will carry it; and therefore I am of the ſame opinion.

The rule was diſcharged.

Vernon

Caſe 317. Vernon and Others *againſt* Jefferies.

In covenant, if there are ſeveral parties named in the deed, but it is only "ſigned, ſealed, and "delivered" by ſome of them, thoſe who did not execute it muſt be excluded as parties by proper averments in the declaration.

S. C. 2. Stra. 1146.
5. Com. Dig. "Pleader" (2. V. 2.).

ACTION ON ARTICLES OF AGREEMENT made between ſeveral perſons, who are ſeparately made parties to the deed, for breach of covenants made for carrying on a ſalt trade among themſelves.

The defendant demanded *oyer* of the articles, by which it appeared, that they were made between nine ſeveral parties, and that the covenants were mutual to all the parties named in the deed, but that the plaintiffs only ſealed and delivered the deed, and that the others, who were not parties to the action, were covenantees in the deed, but did not execute it. And for this variance between the articles and declaration the defendant demurred, and ſhewed for cauſe of demurrer, that it now appeared upon record that there were other parties to the deed who were equally covenantees with the plaintiffs, but were not parties to the action, as they ought to have been. The plaintiffs joined in demurrer.

The queſtion was, Whether thoſe covenantees who did not ſign nor ſeal the deed ought to be made plaintiffs in the action?

This caſe was argued twice: firſt by *Serjeant* BOOTLE *for the defendant*, and *Counſellor* BOOTLE *for the plaintiff*, in *Trinity Term* 1740; and in this Term by DENNISON *for the plaintiff* and FORD *for the defendant*.

IT WAS ARGUED *for the defendant*, that this being an indenture *inter partes*, and all the covenantees being particularly made parties to it by name, is ſufficient to ſhew that they were parties to it, without their ſigning and ſealing it, and therefore ought to be made plaintiffs. That by this deed a joint intereſt is veſted in all the parties to the deed, as being covenantees equally with the plaintiffs, and therefore ought to join with them in the action; for elſe the defendant may be ſued ſeveral times for the ſame thing. It was held on demurrer, that where two were covenantees in a charter-party, though one only ſigned and ſealed it, yet the other, who did not, might ſue upon it with the plaintiff who did execute it. That it is an eſtoppel to all the parties, as well thoſe who did not execute it as thoſe who did, to aver againſt what appears upon the face of the deed. If one of the parties had releaſed to the defendant, it would have barred the reſt, being made *inter partes* (*a*). And if the plaintiff had recovered a judgment againſt the defendant, it could not have been pleaded in bar to any ſubſequent action brought by any other of the parties on this deed. If there be two obligees in a bond, and one only ſue, he muſt ſhew that the other is dead, otherwiſe it is bad. The want of parties in an action on a bond was pleaded in abatement, and it was held for the plaintiff, being brought by the ſurvivor; though it was not averred that the other was dead; but it was ſaid, that if *oyer* had been demanded of the bond, and a demurrer to it, it would be

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(*a*) See 2. Inſt. 673. and 1. Cro. 56.

ſe, a covenant or agreement was entered
he performance of their parts, and on
for a breach of the covenants, it
they all ſhould have joined in
r upon the *oyer* being de-
of the declaration, and
fore, as it appears upon
arties.

ſt thus: The queſtion is, Whe-
een the deed ſet out in the plaintiff's
on the *oyer* given of it by the plaintiff?
re made parties to the deed, and are not
, appear never to have executed the deed, and
reſt in it, and conſequently are not to be parties
here is a great difference between articles of co-
and a deed of feoffment or grant; for in the latter
, though the grantee did not execute it, and an intereſt
rom the grantor without any act done by the grantee, only
he acceptance of the deed; but in the caſe of articles of copartnerſhip they have no operation, unleſs all the parties execute it. If ten men become partners, and all their names are inſerted in the deed, and mutual covenants, but five only execute the deed, it is a copartnerſhip between five only, and has no effect as to the reſt. *Cartwright* and *Another* being joint-tenants demiſed the premiſes, reſerving twenty pounds rent to them both; *Cartwright* alone ſealed and delivered the deed, and brought debt for a moiety of the rent, and a reſervation of ten pounds rent to him; and the Court held, that the declaration was good for a moiety only; for there being an exception of the other's ſealing, which never was done, the deed as to one moiety of the land and the rent reſerved had no effect; and the defendant is to ſhew that they all executed the deed. There is a great difference between a deed made *inter partes* and one that is not ſo: for in the firſt caſe, no one can bring an action upon it, or releaſe by virtue of it, who are not parties to it, and are made ſo in the beginning, and expreſſed ſo to be: but in the caſe of a deed-poll it is otherwiſe; for that is not between parties, but is generally in the firſt perſon: and on that a perſon may ſue who did not execute it, and who was not a party. The queſtion then will be, as this is made *inter partes*, Who are properly the parties to it and have an intereſt in it? And as this is in nature of a copartnerſhip, no one is a party to it but thoſe who executed it, for until then nothing paſſes from him, nor is he bound by it. The neareſt caſe which comes up to the defendant's purpoſe is that in 2. *Roll. Abr.* 22. where in an indenture *inter partes*, and ſeveral covenantees, one who did not ſign or ſeal the deed was allowed to ſue upon it; but this was upon an indenture of grant to another, and an intereſt paſſed without his ſealing the deed, which does not in our caſe, for nothing is conveyed to one or the other, only an undertaking with ſuch who executed the deed. Beſides, *Cartwright's Caſe* is directly contrary to it, and is ſubſequent to it.

As

Vernon and Others *againſt* Jefferies.

As to what has been ſaid, that it being ſet out upon *oyer* it will become part of the record, and inrolled with the reſt, and ſo the variance will appear upon the face of it, that has nothing to do with the preſent queſtion; becauſe if they who did not ſeal it are not properly parties to it, it being mentioned to be made between them and others will not infer that they did ſeal it. Therefore this action could not be brought in any other manner than it is; for if it had, the defendant might have taken advantage of it by pleading that they were no parties to the deed; and therefore the plaintiff is entitled to the judgment of the Court.

In *Trinity Term*, on the firſt argument, the Court ſaid,

Lee, *Chief Juſtice:* Though theſe parties who did not ſign the deed, are not liable to be ſued upon it, nor are bound by the deed, not having executed it, yet it will be a queſtion whether they ought not all to be made plaintiffs in this action, as the covenants are made to them as well as to the plaintiffs. And if they ought to have been joined, I think it may be taken advantage of on this demurrer; for by the *oyer* given of the deed there appears upon the face of it to want parties to the action.

Probyn, *Juſtice.* Where the defendant takes advantage of anything that does not lie in the plaintiff's knowledge, as miſnomer, &c. it muſt be done by plea in abatement, and the defendant muſt ſhew the plaintiff how he may have a better writ. But where it is of what is in the plaintiff's own knowledge, and what he has not ſet out, it is proper to take advantage of it on demurrer.

Chapple, *Juſtice.* No one can be bound as a partner without executing the deed.

Afterwards, in this Term, the Court gave judgment.

Lee, *Chief Juſtice.* I take the diſtinction of this caſe to be, that where there are two covenantors, and one only is ſued, that it is bad, and the defendant muſt plead it in abatement; and where there are ſeveral covenantees, and all are not joined in the action, the defendant need not plead it, but may demur to it if he pleaſe: ſo is 1. *Vent.* 34. 1. *Sid.* 420. Covenant was made to two, and *quolibet eorum*, and one covenantee alone brought an action of covenant; and it was ſaid, that this was ſufficient, for it did not appear that the other was injured; and if not, he had no occaſion to join in an action: but the Court held, that one covenantee alone could not bring the action, but that all muſt join, for elſe the defendant might be troubled ſeveral times for the ſame thing, and that this might be taken advantage of either by pleading or on demurrer. Now as to this caſe it is ſaid, that they are only nominal parties, and need not join, and that it muſt be taken, as it is now ſet out, that they did not all ſeal it. But this I very much doubt of, for here the action is brought by thoſe only who did ſeal it; and upon the *oyer* of it there appears to be others who are parties, and who muſt be taken to have ſealed it; and if they ſhould not all be obliged to join, it might occaſion great multiplicity of actions. It ſeems to be ſettled, that all the covenantees muſt join in the action. When, therefore, it appears on the face of the proceedings that there are other covenantees in the deed, and it does not appear but that they all executed it, for they are all made parties, I think it will be incumbent on the plaintiffs to ſhew why the others are not joined. In 2. *Inſt.* 673. it is ſaid, that *primâ facie* all that are mentioned as parties in the deed ſhall be conſidered as proper parties, and to have executed it, unleſs the contrary appears. There has no anſwer been given to the caſe in 2. *Roll. Abrid.* 22. or to that in 2. *Levinz*, 74. where it is ſaid, all the covenantees muſt bring the action, though they did not all ſeal the deed; and that judgment ought to be given for the defendant.

VERNON AND OTHERS *againſt* JEFFERIES.

The reſt accorded; and that ſuppoſing the other covenantees did not really ſeal the deed, yet they all ought to be made parties.

Judgment for the defendant.

Ellitſon *againſt* Comyns.

Caſe 318.

ACTION ON BOND for the performance of an award. The ſubmiſſion is, "of all matters in diſpute, and of all actions "whatſoever depending between the parties." The arbitrators awarded the defendant "to pay thirty-ſeven pounds to the plaintiff "in ſatisfaction of all actions, &c. as well of thoſe which were "depending between them in their own right as of thoſe which "were brought as executor, &c." It appeared, that there were diſputes between them in both rights, in their own and as executor; but in the ſubmiſſion it is not mentioned between them as executor, &c. only in very general words, "of all actions, &c."

The defendant demanded *oyer* of the award, and demurred for theſe cauſes.

FIRST, That it is not ſet out to be under the ſeal of the arbitrators, which ought to have been. An award cannot be made by deed, unleſs it be in writing; and if ſo, it muſt be under ſeal alſo; for every deed muſt be ſealed, otherwiſe it is but a parol agreement or award.

Declaration on an arbitration-bond is good, FIRST, although it do not appear that the award was under the ſeal of the arbitrators; SECONDLY, although the clauſe to make the ſubmiſſion a rule of court is not ſet out; AND, THIRDLY, although it is not ſaid that the defendant had notice of the award.

SECONDLY, That it is not duly ſet out; for that part which ſays the award ſhall be made a rule of court, is not taken notice of in the declaration; ſo there is a variance between the declaration and the award ſet out upon *oyer*: and *Salk.* 72. was cited, where it was held, that if a man declare upon *a deed*, he need only ſet forth ſo much as will make for him; but where he declares on *a bond* for performance of an award, and ſets out the award only as a collateral matter, he muſt ſet out the whole; and if the omiſſions are a material part of the award, it will be fatal to the plaintiff.

THIRDLY, That it was not ſaid in the declaration that the defendant had notice of the award's being made.

FOURTHLY,

Under an arbitration-bond ſubmitting "all "matters in "diſpute, and "all actions "whatſoever, "&c" to the deciſion of the arbitrators, an award that one of the parties ſhall pay 37l. to the other in ſatisfaction of all actions depending, whether in their *own right* or as *executor*, is good.

Fourthly (which was the principal objection), that the arbitrators had exceeded their authority, having awarded a matter between them as executor, which was not mentioned in the ſubmiſſion, only in the general words "all actions and diſputes, "&c." which did not include it. On a ſubmiſſion "of "all actions, &c." a debt due to the plaintiff in right of his wife cannot be awarded (*a*). An executor cannot maintain an action in his own right and as executor both in the ſame ſuit (*b*); nor can he be charged in both rights at once: ſo here, under theſe general words, a matter in both the rights cannot be determined, they being of two different natures. A ſubmiſſion was generally, "of all controverſies, &c.;" and it was held, that the award was bad, becauſe the arbitrators had exceeded their commiſſion (*c*). A releaſe "of all actions, rights, &c." will not include an action or right, &c. due as executor, nor a demand which is future, and not intended to be releaſed (*d*). So a grant of "*omnia bona ſua*" will not paſs goods which the grantor had as executor, unleſs he had no other goods (*e*). The plaintiff ſhould have averred in the declaration, that all matters in diſpute between them were ſubmitted, as well thoſe which were depending as executor as thoſe in their own right, and that there was no other diſpute between them but as executor; and then thoſe general words might have helped him, as it would in the caſe of releaſe "of "all actions, &c.;" but without ſuch averment it is bad. An award may be good in part and bad as to part; but here they have awarded this as one entire ſum, and therefore muſt be bad for the whole.

It was argued *for the plaintiff*,

As to the first objection, It need not be ſaid to be under the ſeal of the arbitrators, for the condition of the bond is only "ſo as "an award be made in writing, &c.;" and nothing is ſaid of its being under their ſeal: which will likewiſe anſwer the third objection as to the notice; for the plaintiff is not bound to give him notice of it; and the defendant muſt know of the award being made as well as the plaintiff.

As to the second objection, That the award is not duly ſet out, the only omiſſion is of the award being made a rule of court. Now this is not in the arbitrators power to award; for it lies in the breaſt of the Court whether they will do it or not, and therefore can be no part of the award; for the moſt the parties can do is, to endeavour that it may be made a rule of court.

As to the last objection, which goes to the ſubſtance of the award, the ſubmiſſion is in as general and comprehenſive words as poſſible, "of all actions and cauſes of actions depending "between the parties, &c." The plaintiff is executrix to her

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(*a*)

(*b*) Duckworth *v*. Tunſtall, 2. Barnes, 150. Ante,

(*c*)

(*d*)

(*e*)

huſband, and it does not appear there was any other diſpute between them than as executor, &c. Shall therefore the putting in theſe words by way of explanation and ſtrengthening the award make it bad and of no effect which otherwiſe would be good? In the caſes (*a*) in the margin the ſubmiſſion was general, as here, "of all actions, &c. between *A.* and *B.*;" the arbitrators awarded a controverſy between *A.* and *B.* in right of his wife, as adminiſtratrix to *J. S.*; and it was held good, and to be included under the general words.

If the ſubmiſſion be clear, there needs no averment on the plaintiff's ſide; but if the defendant has anything to alledge againſt the award, he ought to plead it ſpecially, and ſhew wherein it is bad.

It is objected, the general releaſes which are to be given muſt be given in both the rights, which was not intended by the ſubmiſſion. But it will be for the defendant's advantage to have a double releaſe, and therefore ought not to be objected to.

IT WAS REPLIED *for the defendant*, That the caſe in *Roll. Abridgement* and in *Bulſt.* is different from this caſe, becauſe there by the intermarriage the huſband was liable for the wife's debts, and they are conſidered but as one perſon, and the huſband is entitled to all ſhe has. But in the caſe of an executorſhip the plaintiff ſues *in autre droit*, and will be liable only as long as there are aſſets.

This caſe was twice argued. On the firſt argument (*abſente* LEE, *Chief Juſtice*) THE COURT ſaid:

PAGE, *Juſtice.* At preſent I think, that the action is well brought, and that theſe objections are of no weight. It is ſaid, that the award ought to be under the ſeal of the arbitrators as well as in writing. But I think there is no occaſion for it; for on the ſtatute of Frauds, where certain agreements are ordered to be put into writing, it is not ſaid they ſhall be ſealed by the parties, becauſe the perjury is prevented without it. Here the award is ſet out on *oyer*, and it appears by the *teſtatum* to be under hand and ſeal both.

As to THE SECOND OBJECTION (or rule of the award not being ſet out), I think here is ſufficient, for there is nothing omitted but the making it a rule of court, which is not in the arbitrators power to enforce.

As to THE LAST OBJECTION, It is true you cannot join a demand in your own right and as executor both in the ſame action; but it appears to me, that the intention of the parties in this ſubmiſſion was, to determine and end everything that was in diſpute between them, whether in their own right, or as executor; and therefore I think the arbitrators have not exceeded their power.

PROBYN, *Juſtice.* If the arbitrators do not exceed their commiſſion, it is no matter when the accord is made, either before or

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(*a*) 1. Roll. Abr. 246. pl. 2. 3. 3. Bulſtr. 65.

upon

Elliſton *againſt* Comyns.

upon the day limited by the ſubmiſſion; and therefore it need not be ſhewn when it was made. Your poſition is right, that a deed is not good unleſs it be ſealed; but in awards it is otherwiſe, for it may be by deed or writing without ſeal, or by parol only; and if the plaintiff ſhew that they have done their duty, and not exceeded the ſubmiſſion, that is ſufficient.—As to making the award a rule of court, that is no part of the condition, but ſeparate from it.

To the objection, That the arbitrators have exceeded their authority in awarding a matter which was not ſubmitted to them; it is not recited in the bond of award that there was any diſpute between them as executor; only ſaid in general, "of all diſputes, "&c." Therefore it is a doubt with me, whether they had any authority to determine anything between them as executor. Here is a ſum in groſs awarded in ſatisfaction of all actions in their own rights, or as executor; and no notice is taken how much is due as executor, and how much in their own rights; ſo that it cannot be diſtinguiſhed how much is aſſets, and how much not. But I give no opinion as to that yet.

Chapple, *Juſtice*, of the ſame opinion as to the firſt three objections, that they are of no weight.

To the last objection, The words are here as general as it is poſſible for them to be. But then it is ſaid, "depending between the parties, or either of them." And it does not appear that there was a diſpute between them as executor. Here it is confined to pay what is due to the plaintiff as executor, &c. In *Roll. Abridgment* it was held, a grant of "*omnia bona et catalla*" would only paſs what the grantor had in his own right, and not what he had as executor. So here will "all and all manner, &c." determine everything.

On the ſecond argument,

Lee, *Chief Juſtice*. The material objection here is, that the arbitrators have exceeded the authority given them by the ſubmiſſion. But I do not ſee how it could be more general and extenſive than it is here. The caſe of the releaſe of *omnia bona ſua* does not ſeem to come up to this caſe, becauſe the word "*ſua*" there confines it to the goods which he had *ſuo jure* only. But here the ſubmiſſion is "of all actions whatſoever;" and though it appear in *Cro. Jac.* 447. that there was an averment that the controverſy between them as executor, &c. was ſubmitted, as well as any other, yet there has been no caſe cited to ſhew that an averment is neceſſary. The caſe in *Roll. Abr.* 246. *pl.* 2. & 3. is exactly to this caſe. The plaintiff may make ſuch averment if he pleaſe; but I think the arbitrators have done rightly, and that judgment ought to be given for the plaintiff.

Probyn and Chapple, *Juſtices*, were now of the ſame opinion with Page, *Juſtice*, as before.

Judgment was accordingly given for the plaintiff.

Martin *againſt* Jenkins.

Caſe 319.

A jurat who has neglected to take the ſacrament purſuant to 13. *Car.* 2. c. 1. may be elected mayor; for the 5. *Geo.* 1. c. 6. ſ. 3. prevents him from being proceeded againſt on account of this omiſſion.

S. C. 2. Stra. 1145. 2. Burr. 1013.

THE PLAINTIFF prayed *a mandamus* to the *Mayor of Winchelſea* to return him mayor for the ſaid corporation, he being duly elected, &c.

At the trial at *niſi prius*, on an iſſue whether he was duly elected or not? A CASE was made (*a*), which ſtated, That by the conſtitution of this borough no perſon can be mayor till he has been a jurat in the corporation; and that the plaintiff was elected a jurat before, but had neglected to receive the ſacrament within twelve months before ſuch election, as is expreſsly required by the 13. *Car.* 2. c. 1. which enacts, "That none ſhall bear any office " of magiſtracy, or other employment concerning the Government " of any cities, corporations, boroughs, cinque ports, &c. that " ſhall not, within one year before their election, have taken the " ſacrament according to the rites of the church of *England*." Then comes the ſtatute of 5. *Geo.* 1. c. 6. ſ. 3. which enacts, " That all the new members of corporations, and every perſon " now in actual poſſeſſion of any office, that were required by the " act of 13. *Car.* 2. to take the ſacrament of the Lord's Supper, " according to the rites of the Church of *England*, within one " year next before his election, are hereby confirmed in their " ſeveral offices, notwithſtanding their omiſſion to take the ſaid " ſacrament." Nor ſhall any perſon " hereafter to be choſen to " any of the ſaid offices be removed by the Corporation, or other- " wiſe proſecuted, for ſuch omiſſion, nor ſhall any incapacity, &c. " be incurred thereby, unleſs ſuch perſon be removed, or ſuch " proſecution be commenced, within ſix months after his election; " and in caſe of a proſecution, the ſame be carried on without a " wilful delay." The plaintiff had not received the ſacrament within one year before he was elected jurat, but had been a jurat more than twelve months.

The queſtion was, Whether this ſtatute of the 5. *Geo.* 1. c. 6. had ſo diſpenſed with the taking the ſacrament as to enable him to be mayor? or, Whether the omiſſion of it diſqualified him from being a jurat?

Price, *Serjeant*, urged, that this ſtatute was made only to quiet corporations in their ſeveral offices after they had enjoyed them for ſome time undiſturbed; that the ſtatute relates only to that particular office in which the ſacrament is ordained to be taken, but did not extend to help him in his qualification for any other office; only that he ſhould not be removed from or proſecuted in that particular office where the omiſſion was but within ſix months; and that therefore this caſe was out of the act, which is not a proſecution againſt the plaintiff to diſturb him in his office of jurat; but he is plaintiff himſelf, and prays the *mandamus*, and therefore ought to ſhew himſelf a complete jurat according to the act of

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(*a*) It is ſaid, 2. Stra. 1145. to have been a ſpecial verdict.

Martin *againſt* Jenkins.

13. *Car.* 2.; and that according to the cuſtom of the corporation he is qualified to be a mayor.

The Court were all of opinion, that the words "no incapacity ſhall be incurred thereby" muſt take in all incapacities which may be occaſioned by the omiſſion of not receiving the ſacrament; and that is an incapacity which is helped by the ſtatute 5. *Geo.* 1. which does not only take in that particular office before which the ſacrament is omitted to be taken, but alſo any ſubſequent office in which the completing the firſt office is any way concerned.

In what caſe a negative finding is not neceſſary.

But an objection was ſtarted by Chapple, *Juſtice*, that as the plaintiff makes uſe of the ſtatute of 5. *Geo.* 1. to bring himſelf out of the 13. *Car.* 2. he ought to ſhew himſelf to be within the deſcription of the act in all particulars; and that it is not found, that an action or proſecution was not commenced within ſix months againſt him; it is only ſaid, that he continued a jurat till 1740.

Lee, *Chief Juſtice*, ſeemed to think, that if any proſecution had been commenced againſt him, the defendant ought to have ſhewn it. But of this they ſaid they would conſider.

Afterwards, in the ſame Term, they all agreed, that ſufficient was found to entitle him to his office of mayor, for they have not found anything to avoid the election of a jurat, which was legal, only that the plaintiff did not receive the ſacrament, which does not make the office void, but voidable only; and they have not found that he was removed or proſecuted for it, which ought to have been ſhewn on the defendant's part.

Judgment for the plaintiff.

Caſe 320. Smith, on the Demiſe of Dormer, *againſt* Parkhouſe and Others.

S. C. 3. Atk. 135.

In an ejectment a ſpecial verdict was found, that *John Dormer*, on the marriage of his ſon *Sir John Dormer*, ſettled the
premiſes in queſtion, of which he was ſeiſed in fee, "on *Sir John*
" his eldeſt ſon for ninety-nine years, if he ſhould ſo long live,
" remainder to his wife (as to part) for her life, remainder to
" truſtees to ſupport contingent remainders, remainder to the firſt
" and other ſons in tail male, remainder to truſtees to raiſe portions
" for daughters, remainder to *John Dormer* for life; and from
" and after his deceaſe, remainder to the uſe of *Robert Dormer*
" (the judge), ſecond ſon of *John Dormer*, and his aſſigns, for and
" during the term of ninety-nine years, if he ſo long live;
" and from and after the death of the ſaid *Robert Dormer*, or other
" ſooner determination of that eſtate, then to and for the uſe of
" truſtees and their heirs for and during the natural life of the ſaid
" *Robert Dormer*, to preſerve contingent remainders; and after
" the

“ the end or other ſooner determination of the ſaid term, remainder to the firſt and other ſons of *Robert* in tail-male, remainder to *Fleetwood Dormer*, third ſon of *John*, in the ſame manner, remainder to *John Dormer* in tail male, remainder to his brothers in the ſame manner, remainder to *Euſeby Dormer* his nephew (under whom the preſent plaintiff claims as his ſon and heir male) for ninety-nine years, if he ſhould ſo long live, remainder to truſtees to ſupport contingent remainders, remainder to his firſt and other ſons in tail male, remainder to *John Dormer*, the ſettlor, his heirs and aſſigns, for ever.” They find, that *Robert Dormer*, upon the death of his brother *Sir John Dormer* without iſſue, and the determination of the other precedent remainders, became poſſeſſed of the premiſes in queſtion for ninety-nine years, if he ſhould ſo long live, remainder as above limited. That the ſaid *Robert Dormer* had a ſon, *Fleetwood Dormer*, and no other iſſue male. That in *Eaſter Term*, in the twelfth year of *George the Firſt*, the ſaid *Robert Dormer* and his ſon *Fleetwood* levied a fine and ſuffered a recovery of theſe premiſes. That *Fleetwood* died without iſſue in the life-time of *Robert*; and that *Robert Dormer* afterwards died without iſſue male, leaving four daughters, *Mary*, *Elizabeth*, the wife of *Sir John Forteſcue Aland*, *Ricarda*, wife of the defendant *Parkhouſe*, and *Catherine*, who are now the defendants. They find the ſeveral entries of the defendants, and that *Euſeby Dormer* left iſſue male the preſent leſſor of the plaintiff, who likewiſe entered upon the defendants, and made the demiſe to the plaintiff *Smith*.

This caſe was twice argued at the Bar; by DENNISON and CHUTE *for the plaintiff*, and by HOLLINGS and FILMER *for the defendants*.

THE GENERAL QUESTION was, Whether the recovery ſuffered by *Robert Dormer*, the judge, and his ſon *Fleetwood*, was a good bar of the eſtate-tail? And this depended on the three following queſtions, which are dependent on each other:

FIRST, Whether by the fine levied in *Eaſter Term*, in the twelfth year of *George the Firſt*, by *Robert Dormer* and *Fleetwood* ſufficient paſſed to make a good tenant to the *præcipe*?

SECONDLY, Whether the freehold, at the time of the fine and recovery ſuffered, was in *Robert* or *Fleetwood*? or, Whether it was in the truſtees?

THIRDLY, Whether the eſtate limited to *Robert* for ninety-nine years, remainder to the truſtees as above, be a contingent or veſted eſtate in the truſtees?

The plaintiff claimed as heir male of the laſt remainder-man, under the ſettlement of *John Dormer* on the marriage of *Sir John* his ſon; and he contended, that as *Robert* (under whom the defendants claimed) was only a tenant for years, he could not, even with his ſon's joining with him, make a good tenant to the *præcipe*; and that the fine levied by him in *Eaſter Term*, in the twelfth year of *George the Firſt*, was a forfeiture of his eſtate, which immediately veſted in the truſtees in poſſeſſion, ſo that the freehold being in the truſtees, and they not parties to the recovery, it will be no bar to the leſſor of the plaintiff, who is the remainder-man in tail male under this ſettlement.

The defendants ſaid, that the truſtees have only a right of entry which is contingent, and not a veſted eſtate; for *Robert* might outlive the ninety-nine years, and have a ſon living, and then the truſtees could not have taken at all, for there would have been a perſon *in eſſe* to have taken. That the limitation of this eſtate is repugnant and uncertain, and therefore void; it is firſt limited to the truſtees after the death of *Robert*, for *Robert*'s life; and then, after the end or other ſooner determination, to the firſt and other ſons, &c. That the fine levied by *Robert* and *Fleetwood* is not void, but voidable only, and therefore will be good, till avoided, to make a good tenant to the *præcipe*.

The plaintiff replied, that though the fine is uncertain when the eſtate will veſt in the truſtees in poſſeſſion, yet it veſted in point of intereſt immediately, *reddendo ſingula ſingulis*, according to *Leon. Lovey's Caſe*, 10. *Rep.* 85. *b.* elſe how can it ſupport another eſtate that is contingent, unleſs itſelf veſted ſomehow? for one contingency cannot ſupport another. That upon *Robert*'s levying the fine he committed a forfeiture, and then the eſtate veſted immediately in the truſtees in poſſeſſion which before veſted only in intereſt; and that the words "other ſooner determination" mean ſooner than the natural death of *Robert Dormer*, which may be by ſurrender, forfeiture, or effluxion of time. That marriage-ſettlements are conſtrued as favourably as wills; and therefore the law, in ſupport of the intention of the parties, will help any uncertain words or miſtakes, as the *vitium clerici*, and not make it void for little uncertainties or miſtakes. That the eſtate is not to be left to the mercy of the truſtees, whether they will enter or not. Therefore upon *Robert*'s committing the forfeiture by levying the fine, the law will ſuppoſe they immediately entered as they ought.

This Term, the Chief Juſtice delivered the opinion of the Court.

LEE, *Chief Juſtice.* Upon this ſpecial verdict the queſtions are,

FIRST, Whether the common recovery in which *Fleetwood* the ſon was vouched be a good bar of this eſtate-tail? And that depends on this point,

SECONDLY, Whether there was a good tenant to the *præcipe*? The tenant was made by *Robert* the judge, who was a leſſee for ninety-nine years, if he ſo long lived, and by *Fleetwood* the ſon, to whom the remainder was limited in tail. And though *Robert* was but a tenant for years, yet it is ſaid,

FIRST, That by this fine a freehold paſſed, for that it was not void, but at moſt only voidable.

SECONDLY,

SMITH, on the Demiſe of Dormer, *againſt* Parkhouse and Others.

SECONDLY, That if the fine levied by *Robert* was not alone ſufficient to paſs any freehold, yet by the ſon's joining with his father they both made a good tenant to the *præcipe*, notwithſtanding the eſtate limited to the truſtees to ſupport contingent remainders, which it is ſaid is either void in its creation, or at leaſt contingent only, and never veſted ; and that this limitation paſſed no eſtate to the truſtees, only gave them a right of entry to the purpoſe of the truſt.

FIRST, As to the fine levied by *Robert*, no caſe has been cited to prove it effectual, and the law is now clear and ſettled, that a fine levied by tenant for years by reaſon of the inability of his eſtate, *nihil operatur*, for being in the realty it is neceſſary that the perſon who ſuffers it ſhould have a freehold. So is *Saffyn's Caſe (a)*, 3. *Co.* 78. *Fermor's Caſe*, *Hard.* 400. And ſo was it held in the caſe of *Hunt v. Bourne*, in *Salk.* 339. which I cite from a manuſcript of LORD HOLT's, where he ſays, that if tenant for years make a feoffment in fee, this deveſts the whole eſtate of him in reverſion ; but if he levy a fine, *nil operatur* ; by which it is plain he meant no freehold paſſes, becauſe he puts a fine in oppoſition to a feoffment, which deveſts the eſtate, but a fine does not ; and it may be alledged, *quòd partes finis nil habuerunt* ; that a fine is improperly called a feoffment on record, and has only the effects of a feoffment to ſome purpoſes, if he who levied the fine was ſeiſed of the freehold at the time of the fine levied ; and of that opinion was LORD MACCLESFIELD, in the caſe of *Carter v. Barnardiſon (b)*.

Taking it then that this fine had no effect to paſs a freehold, I will now conſider what effect *Fleetwood*'s joining with his father in the fine and recovery will have ; and as to that it is certain, if there was any freehold in *Fleetwood* the recovery will be a good bar.

But WE ARE ALL OF OPINION, that the freehold was not in *Fleetwood*, and that the remainder to the truſtees to preſerve the contingent uſes was not void nor contingent, but a veſted eſtate, and that it cannot be conſtrued as giving only a right of entry, as has been inſiſted at the Bar. In *Co. Lit.* 143. *a.* there is this deſcription given of a remainder, "that it is a remainder or remnant of an eſtate in lands or tenements expectant upon a particular eſtate created together with the ſame ; and it is ſo expectant upon the particular eſtate, that either it muſt take effect the inſtant in which the particular eſtate determines, or elſe it is void." The reaſon given at the Bar to prove this a void remainder is, that it is limited to the truſtees to commence after *Robert*'s death, and then afterwards to hold during his life ; which it is ſaid is repugnant. Were there no other words to explain thoſe, there might be ſome force in the objection. But the words are, "and from and

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(a) 5. Co. 123.

(b) 1. Peer. Wms. 119.

“ after the death of the ſaid *Robert Dormer*, or other ſooner determination of his eſtate, then to the truſtees, &c.;” which words, “ or other ſooner determination,” anſwer the objection, and muſt mean, by ſurrender, forfeiture, or effluxion of time, which may happen ſooner than the death of *Robert*; and ſo here are words to make this a reaſonable limitation, and poſſible to take effect. But in anſwer to this it was inſiſted, that where a remainder was limited to take effect on two disjunctives which cannot ſtand together, one of them being impoſſible (as in this caſe a limitation upon *Robert*'s death to hold during his life), there the Court will not reject the impoſſible disjunctive, but conſtrue the whole limitation void. And to prove this was cited the caſe of *Comberford v. Birche*, 2. *Lev.* 157. where a ſettlement was made with a proviſo, that if none of the brothers of the grantor, or their children, were living at ſuch a time, then he gave the eſtate to his brothers ſucceſſively; and the Court held it to be a void limitation. But I think that caſe does not come up to the preſent, for the Court did not determine upon the abſurdity or impoſſibility of both the disjunctives taking place (it being limited to his brothers after all his brothers deaths); but the ground of their opinion was, that the death of the brothers children was a condition precedent, and therefore whilſt they were living the remainder to the brothers could not take effect. Now here the death of *Robert* could never be intended as the only condition upon which the remainder to the truſtees ſhould take effect, but only as a ſooner determination, as is afterwards expreſſed.

SECONDLY, In the next place it is ſaid, that ſuppoſing the remainder was not void in its creation, and that it was poſſible to take effect at firſt, yet it is contingent, and is now become void by event; for it was uncertain not only as to the time when the determination might happen, but likewiſe whether it might ever happen, for *Robert* may have been preſumed to have outlived the term. But I think this is a miſtake, and that there is no warrant for ſuch a poſition by any rules of law.

Contingent remainders are of three ſorts.

FIRST, When it is a limitation to one not *in eſſe*; for in that caſe, if the remainder-man never come *in eſſe*, it is a void remainder.

SECONDLY, When the particular eſtate may determine before the remainder can commence; as to *A.* for life, remainder to *B.* to commence upon the death of *C.* the remainder to *B.* is gone.

THIRDLY, When there is a condition precedent, or ſomething to happen before the remainder can take effect, which may never happen at all; as a remainder to commence when *J. S.* ſhall return from *England* to *Rome*.

Now the preſent remainder cannot be ſaid to be contingent within any of theſe three deſcriptions: For, firſt, here are perſons *in eſſe* to take; ſecondly, the remainder does not depend on the death of *Robert*, for it is limited "from any ſooner determination of "the eſtate," ſo that immediately upon the expiration of the particular eſtate the remainder is to commence; thirdly, nor is here any precedent condition to be performed in order to give the truſtees a title. In our caſe, the remainder depends on ſuch facts which muſt determine the particular eſtate from the nature of the eſtate itſelf, and which were underſtood ſo to be when the remainder was originally created; for all eſtates for years determinable on the leſſees lives may determine not only by the death of the party or effluxion of time, but alſo by ſurrender or forfeiture; and ſuch the law takes notice of, and will expect, as appears by 2. *Co.* 151. *Cholmley's Caſe*, and 1. *Saund.* 151.: as a leaſe for life to *A.* remainder to another during the life of *A.* this is good only by poſſibility that the remainder may take effect by the tenant's for life aliening or committing a forfeiture. And this therefore is conſidered as an intereſt in the grantor which he may limit, and as that ſort of eſtate which truſtees have for ſupporting contingent uſes, and is not a mere right of entry, nor a contingent remainder, but a veſted eſtate to take effect by thoſe ways and methods of determination to which the particular eſtate was ſubject when it was created. And for this *Co. Lit.* 42. *a.* puts a caſe which explains this matter exactly. If tenant for life, ſays he, make a leaſe by deed, or without deed, to him in the remainder or reverſion, in tail or in fee, for the life of him in the remainder or reverſion, and afterward he in the remainder or reverſion take a wife and die, his wife ſhall not be endowed, but the particular tenant ſhall enjoy the land again; for it cannot be a forfeiture, he in the remainder being party to the alienation; and it cannot be a ſurrender, becauſe his whole eſtate was not departed with. So here the poſſibility of the leſſee's dying in the leſſor's life-time, or his forfeiting or ſurrendering the eſtate, ſtill remains in the grantor, and is what *Lord Coke* calls a freehold, and puts this caſe as an inſtance, where there may be ſeveral freeholds derived out of the ſame eſtate; and though it is but a poſſibility, yet it is ſufficient to prevent the wife of him in remainder from being endowed. Agreeably to this is *Duncombe's Caſe (a)*: *A.* tenant for life, remainder to *J. S.* and his heirs for the life of *A.* remainder to *A.* in tail; the Court held, that the remainder to *J. S.* though but a poſſibility, was ſuch an interpoſing eſtate between the eſtate firſt limited to *A.* for life, and the laſt eſtate limited to him in tail, that *A.* could be conſidered as no more than a bare tenant for life, and conſequently his wife could not be endowed: which ſeems to be our very caſe as to this point; for I take it, that *J. S.* could be no other than a truſtee there for preſerving the contingent uſes; though the caſe is not ſo fully reported.

Thus much to ſhew upon what ground limitations to truſtees made in common form muſt operate.

(a) 3. Lev. 437.

Smith, on the Demiſe of Dormer, *againſt* Parkhouſe and Others.

The next thing is to conſider, What conſtruction the preſent limitation ought to have?

And I think it operates in the ſame manner as the common limitations do; I mean, that part of it which is called contingent, and takes its name from the words "or other ſooner determination." The common kind of limitation is, firſt "to *A.* for life; and from and after the determination of his eſtate, then to truſtees for the life of *A.*" or elſe "to *A.* for ninety-nine years, if he ſo long live, and from and after the end of the term, then to truſtees during the life of *A.*" In the firſt caſe, the remainder limited to the truſtees being to commence during *A.*'s life, it cannot take effect upon the natural death of *A.* nor otherwiſe than by a ſurrender or forfeiture of his eſtate; nor in the ſecond inſtance otherwiſe than by effluxion of time or by ſurrender or forfeiture; or perhaps in both caſes by civil death. And I think the ſame objections which have been made in the preſent caſe may as well be made to every limitation for preſerving contingent remainders; for though the words "or other ſooner determination" are not always inſerted, yet there are no truſt ſettlements to be found which do not import as much. In *Bridgman*, 334. there is a like ſettlement, without theſe expreſs words, indeed, but the conſtruction upon it muſt be the ſame as if they had been inſerted, becauſe the remainder is there limited to the truſtees only during the life of the tenant for years, and therefore muſt be conſtrued to commence on a determination of the term before the leſſee's death, elſe it can never commence or take effect at all. The meaning of theſe limitations is, that when an eſtate is given to *A.* for life, the limitor has, notwithſtanding, an intereſt remaining in him to enter upon an alienation or forfeiture, &c.; which intereſt, when conveyed to the truſtees, is a remainder or legal eſtate, which they are ſaid to have for preſerving the contingent uſes, and is ſo called by Lord Cowper, in 2. *Vern.* 755. So in the common caſe of marriage-ſettlements, where an eſtate is limited to the firſt taker, either for ninety-nine years or for life, with a remainder to truſtees to ſupport the contingent remainders during his life: We are of opinion, that by ſuch limitation a preſent freehold paſſes to the truſtees, ſubject to the term of ninety nine years, in ſuch manner that it cannot take effect until the determination of that term, but that determination muſt always be in ſome manner or other ſooner than the natural death of the particular tenant. And though this remainder may depend on the truſtees coming into poſſeſſion, or upon a ſurrender or forfeiture, which may or may not happen, yet ſuch facts are in law poſſibilities not remote, and not merely contingencies, but veſted intereſts; and it would be of the moſt dangerous conſequence, and might overturn moſt of the family-ſettlements in the kingdom, if a different conſtruction were to prevail, becauſe it would then be in the power of a *ceſtuy que uſe* to bar any ſettlement without the conſent of the truſtees.

Ellice *v.* Oſborne.

We are all therefore of opinion, that this limitation did veſt a freehold in the truſtees, and that the fine levied to make a tenant to the *præcipe* was not good, and paſſed no eſtate, and ſo the recovery will be no bar; and that the leſſor of the plaintiff muſt have judgment.

The King *againſt* The Mayor of Weymouth, Dorſet. Caſe 321.

If a charter authoriſe the mayor and aldermen to nominate four burgeſſes as candidates for the mayoralty, a by-law, that any burgeſs, though he is an *alderman*, may be put in nomination, is void; for it is contradictory to the charter, which confines the nominees to *the bailiffs* only.

S. C. 1. Barn. 26.

QUO WARRANTO to the defendant for exerciſing the office of mayor for the borough of *Weymouth*, in *Dorſetſhire*, not being qualified.

The defendant pleaded, that by letters patent in the fourteenth year of *James the Firſt*, it was incorporated by the name of mayor, divers men called aldermen, two bailiffs, and twenty-four capital burgeſſes at large; that once in every year the mayor and aldermen are to nominate four of the burgeſſes, being inhabitants, one of whom is to be choſen mayor by the commonalty at large; that on the Feaſt of *St. Michael* the mayor and aldermen met together and choſe out four of the burgeſſes, being inhabitants, of whom the defendant *Tucker* was one, and that he was elected mayor by a majority of the burgeſſes at large; and by this title he claims to be mayor.

The relator in reply admitted the charter as ſet out, and ſaid, that the four perſons ſo nominated were burgeſſes and inhabitants, but that the defendant *Tucker* was alſo an alderman at that time, and therefore diſqualified to be choſen mayor, who ought to be choſen from the burgeſſes at large, and not from the aldermen.

The defendant rejoined, and ſet out a by-law uſed time immemorial, by which any of the burgeſſes who were inhabitants may be put in nomination for the mayoralty, though they were aldermen, which will not prevent his being choſen mayor: and then averred, that the defendant *Tucker* was a burgeſs and inhabitant at the time of his nomination and election.

To this the relator demurred, and the defendant joined in demurrer.

In ſupport of the demurrer two queſtions were inſiſted on:

First, As to the pleading, that the defendant's rejoinder is a departure from the plea, for he ſhould have diſcloſed this whole matter in his plea, and there have ſet out the by-law, and not have inſiſted on two different matters, firſt the charter, and then the by-law; and cited 1. *Inſt.* 304. *a.* 1. *Lev.* 81. 2. *Lutw.* 1425.

Secondly, That ſuppoſing the pleading good, yet that the by-law is void in itſelf, being inconſiſtent with the charter, and creating a new conſtitution, and a new method of election, different from what the charter gives: for by the charter, the mayor is to be choſen out of the burgeſſes at large, but this by-law gives a power of electing the mayor out of the aldermen, which the charter never

THE KING *againſt* THE MAYOR OF WEYMOUTH, DORSET.

intended; and relied on the caſe of *The King v. Phillips, Mayor of Bodmin*, in *Michaelmas Term*, in the ſeventh year of *George the Firſt*, where an iſſue was joined on a by-law, which appeared by the pleadings to be inconſiſtent to the charter, and held immaterial from what appeared on the pleadings.

THE COURT did not give any opinion on THE FIRST OBJECTION, but reſted on the ſecond only.

LEE, *Chief Juſtice*, ſaid, that if the by-law would have given the defendant any right, he had deprived himſelf of the benefit of it by the departure in the pleadings; for that the defendant ſhould have ſhewn his whole caſe in the plea, and there have ſet out the by-law.

As to THE SECOND OBJECTION they held, that the by-law would be entirely out of the caſe; for unleſs the charter gave a power of electing any of the aldermen to be mayor, the by-law could not do it, for it would be giving a new power to themſelves, which the charter did not intend: nor can a by-law explain a charter, for that muſt be done by the Judges; it can only contract or abridge, and enforce the power given by the charter for the good of the corporation, but cannot increaſe it: and upon this foundation was the caſe of Corporations determined 4. *Co.* 77. *b.* that it was to avoid popular diſcord and confuſion.

This by-law, therefore, will be out of the caſe: and the queſtion will reſort to the charter itſelf, Whether, as the facts now appear upon the pleadings, here is a power given of electing the mayor out of any of the aldermen as well as from the burgeſſes at large? or, Whether the four that are put in nomination muſt be confined to the burgeſſes at large who are not aldermen?

As to that THE COURT were all of opinion, that by the charter the aldermen are excluded from being elected mayor, which is confined to the burgeſſes at large, not aldermen; and it would otherwiſe cauſe great confuſion if the ſame perſon was to act in two capacities, when the charter plainly conſiders them as diſtinct perſons.

Judgment was given for the king.

Caſe 322.

Jones *againſt* Gegg.

Prohibition to a ſuit in the ſpiritual court againſt a clergyman for *non-reſidence*, and keeping a grammar-ſchool without licence

LIBEL IN THE SPIRITUAL COURT againſt *Gegg*, as parſon of a pariſh in *Glouceſterſhire*, ſet forth ſeveral canons whereby the clergy are required to be reſident upon their cures to read prayers on *Wedneſdays*, *Fridays*, and *Holy-days*; that the defendant reſided at *Glouceſter* and not upon his living; that he taught a grammar-ſchool at *Glouceſter*, without licence from the biſhop; and that he continued to neglect his duty and teach ſchool without licence, though admoniſhed by the biſhop.

The Counsel, *for a prohibition*, ſuggeſted the ſtatutes Non-reſidence, and againſt teaching ſchool without licence; and that *Gegg* had a freehold in his ſchool, and in right of that a ſtall in the church of *Glouceſter*, where he was reſident, and ought not to be diſſeiſed of his freehold; and cited 2. *Salk.* 550. 1. *Vent.* 41. *Corey v. Pepper*, 2. *Lev.* 222.

It was argued, that the ſpiritual court ought never to proceed in any caſe where the anſwer to the libel would ſubject the party to a temporal penalty, as it would do here without reſidence.

It was argued *againſt a prohibition*, that the ſpiritual court had a general juriſdiction over clergymen, and particularly as to their reſidence and duty; that the ſtatute of *Henry the Eighth* was to prevent dilapidations, and did not take away the juriſdiction of the ordinary.

Lee, *Chief Juſtice*. The teaching ſchool without licence is now made a temporal offence, and a penalty given for doing it; ſo it ſeems the ſpiritual court has now no juriſdiction of this offence (*a*). As to the non-reſidence, it is a queſtion of too great conſequence to be determined upon motion. *Mr. Gegg* is a clergyman; yet as there is a penalty annexed to non-reſidence, and no ſaving of the eccleſiaſtical juriſdiction, it deſerves well to be conſidered whether it is not extinguiſhed.

So a prohibition was granted to the whole, that the plaintiff might declare.

(*a*) See Chedwick *v.* Hughes, Carth. 464. Hill *v.* Boomer, 2. Jones, 131. 2. Sid. 67.—And maſters of grammar-ſchools muſt be licenſed by the ordinary, who may examine the party applying for a licence as to his learning, morality, and religion, Rex *v.* Archbiſhop of York, 6. Term Rep. 410 and may take a reaſonable time to enquire whether he is properly qualified, Rex *v.* Biſhop of Litchfield, 2. Stra. 102. Comy. Rep. 448. Ante, 217.

Dent *againſt* Coates.

Caſe 323.

A custom that the churchwardens of a particular vill, and ſo many of the inhabitants as ſhall think fit to meet, ſhall make a church rate; and that when the whole pariſh ſhall pay *forty ſhillings* the particular vill ſhall pay *twelve ſhillings*, is void for uncertainty.

S. C. 2. Stra. 1145.

A LIBEL was preferred in the ſpiritual court againſt *Mr. Dent*, for refuſing to pay his ſhare of a church-rate aſſeſſed upon him by the churchwardens of *Northallerton*. *Mr. Dent* prayed a prohibition to the eccleſiaſtical court upon a ſuggeſtion of this cuſtom: He ſaid *Northallerton* was an antient pariſh and conſiſted of many vills, whereof *Romanby* was one; that the lands for which he was charged lay in *Romanby*, in which place there was this cuſtom, that twenty-four of the inhabitants of *Northallerton*, or the majority of ſuch twenty-four, had, for time out of mind, uſed to make a general aſſeſſment for the repairs of the church for all the pariſh, and that when ſuch aſſeſſment was ſo made, the churchwarden and ſo many of the inhabitants of *Romanby* as ſhould think fit to meet had, for time beyond memory, been accuſtomed to raiſe a certain proportion of ſuch general aſſeſſment among themſelves, diſtinct from the reſt of the pariſh. And *Mr. Dent* farther ſuggeſted, that in the year 1608 the inhabitants of *Northallerton* and *Romanby* came to this agreement, that when *Northallerton*

DENT *againſt* COATES.

lerton ſhould aſſeſs the whole pariſh in forty ſhillings, then *Romanby* would aſſeſs itſelf at twelve ſhillings.

Upon theſe ſuggeſtions A PROHIBITION went, in which *Mr. Dent* declared upon this cuſtom and agreement. *Mr. Coates*, the defendant in prohibition, pleaded there was no ſuch cuſtom or agreement. Theſe iſſues went down to trial, and the jury found the cuſtom and agreement as above.

And this day *Serjeant* BURNETT, THE SOLICITOR GENERAL, and *Serjeant* DRAPER, *moved in arreſt of judgment*, and that a writ of CONSULTATION might go upon the following reaſons: They argued, that this cuſtom is void for uncertainty. FIRST, It is uncertain who ſhall make the aſſeſſment, for the cuſtom is, that the churchwardens and ſuch of the inhabitants as ſhall think fit to meet ſhall make it, and not that the churchwardens and ten or twenty, &c. or the major part, or any other certain number of the inhabitants, ſhall make it. The cuſtom therefore, as it is laid, depends ſo much upon the will of the inhabitants, that none of them are obliged to meet; and if none of them do meet, no aſſeſſment can be made; and it is not reaſonable that *Northallerton* ſhould be charged with the whole. A cuſtom, that tenants of a manor ſhall not put in their cattle until after their lord has put in his, is void becauſe uncertain; for the lord may never put in his cattle, and it is not reaſonable that the commoner ſhould loſe his common. A cuſtom that ſuch tenants of the manor as come firſt to the place where, &c. ſhall have all windfalls, is void for uncertainty, becauſe it lies in the will of man, and the will of man is uncertain. The cuſtom is alſo void for the uncertainty of the ſum to be aſſeſſed, for the cuſtom is to aſſeſs a certain proportion towards the general aſſeſſment; in which caſe not only the general aſſeſſment is uncertain until it is actually made, but alſo the proportion which *Romanby* is to advance to it is indeterminate; for the cuſtom is not to raiſe the third, fourth, or any other certain proportion of it; and upon ſo indefinite a cuſtom they may advance any proportion whatſoever, ſometimes more and ſometimes leſs; and to this they applied the following caſes, 1. *Keb.* 612. 2. *Salk.* 657.—2. *Roll. Abr.* 264. *Dal. pl.* 1, 2. A cuſtom that the tenants of a manor ought only to pay two years rent, or leſs, to renew their copyholds is void, becauſe they are ſometimes to pay two years rent and ſometimes leſs: ſo it is a bad cuſtom to pay a penny, or thereabouts, for tithes for every acre of arable land, becauſe uncertain. *Latch*, 217. A cuſtom to pay to the reparation of a church in proportion to the tax to the king, is void for uncertainty, becauſe it does not appear what the king's tax is.

Davies, 33. 1. Roll. Abr. 565. 4. S. C.

BOOTLE and DENNISON *argued for the plaintiff* in prohibition, that as the verdict had found the cuſtom, the uncertainty could now be taken no advantage of; for that which might be an objection and taken advantage of before verdict cannot be ſo afterwards:

wards: and for the goodneſs of the cuſtom cited *Carth.* 12. 3 *Lev.* 255. that a cuſtom to pay for a time certain a year's value of the land at the time of admiſſion is certain enough, and iſſuable and triable by a jury, whether it be of ſuch yearly value or not.

The Court. This is a controverſy between one part of a pariſh with another part of the ſame pariſh, and the original proceeding in this cauſe is a libel in the ſpiritual court upon an aſſeſſment made by the churchwardens of *Northallerton*, in which *Mr. Dent*, who prayed the prohibition, is rated; and a prohibition went upon a ſuggeſtion of the cuſtom, for though the eccleſiaſtical court has juriſdiction in church rates, yet it cannot try a cuſtom, becauſe a matter at common law. The conſideration before us is, whether the cuſtom is ſuch a one as will excuſe *Mr. Dent* and the reſt of the inhabitants of *Romanby* from the ordinary and common method of aſſeſſing. Nothing is clearer than that if the Court ſees upon the face of the record a cuſtom that is uncertain or unreaſonable in the nature of it, the finding it by verdict will not give any force to it, for it is matter of law, with which the jury cannot intermeddle. The Court indeed, after verdict, will excuſe want of form in a record, if the ſubſtance appear to be ſuch as will entitle the plaintiff to a verdict; though ſuch deficiency of form might have been taken advantage of by demurrer before verdict; but that is not the caſe here, for the cuſtom is not matter of form, but the ſubſtance of the thing in iſſue; and the jury finding a cuſtom cannot authenticate it, for that is a matter proper for this Court. And to deſcend to the cuſtom itſelf, there are two ſtrong objections to invalidate it, both for the uncertainty and unreaſonableneſs of it. The cuſtom is, that the churchwardens of *Romanby*, and ſuch of the inhabitants as ſhall think fit to meet, ſhall make the aſſeſſment; which is uncertain, for it does not require the majority, or any certain number of the inhabitants to make it. The other and the ſtronger objection is, of one part of a pariſh preſcribing againſt another part of the ſame pariſh, to aſſeſs themſelves at what they ſhall think fit; for if the twenty-four inhabitants of *Northallerton* ſhall make the general rate at ten pounds, it will be in the power of the inhabitants of *Romanby*, by this cuſtom, to aſſeſs themſelves at one farthing. Nor do we think the agreement in 1608, which ſays, that when the general rate is at forty ſhillings for the whole pariſh, that *Romanby* ſhall aſſeſs itſelf at twelve ſhillings, will at all aid the cuſtom; for we cannot go upon the agreement, but muſt judge upon the foot of the cuſtom itſelf; for it does not follow from this agreement that the uſage was in this certain proportion before, though it may be an inducement to the jury to believe that the cuſtom was ſo before: beſides, to conſider the agreement as ſuch, it cannot at all bind the ſucceeding pariſhioners; for though pariſhioners may be bound by their own contract, yet they are not ſuch a corporation as to bind their followers. It will be nothing to ſay how juſtly *Romanby* has, or how equitably it will, aſſeſs itſelf;

ſelf; for if this Court was to authorize *Romanby* in this cuſtom, it would be at leaſt putting it in its power to act unreaſonably, which this Court will never do.

Therefore no judgment muſt be given, and a conſultation muſt go.

Caſe 324.

The King *againſt* O'Brian.

To forge an *affidavit* for the purpoſe of obtaining money due to an officer's widow from the treaſurer of the king's bounty, is indictable at common law.

S. C. 2. Stra. 1144.
S. C. 2. Seſſ. Caſes, 366.

O'BRIAN was indicted at *the Old Bailey* for publiſhing a falſe, forged, and counterfeit affidavit, well knowing it to be ſo, purporting it to be ſworn before *Mr. Engeer*, a juſtice of peace, the contents of which were, that *Mrs. A. B.* being an officer's widow, and entitled to the yearly penſion of ſixteen pounds, was living and in *Ireland*, although ſhe was dead, and this with an intent to deceive *Mr. Saintbill*, the treaſurer of the king's bounty for officers widows; and alſo for publiſhing a falſe, forged, and counterfeit certificate, knowing it to be ſo, purporting to be ſigned by the parſon and churchwardens of *D.* the contents of which were, that *Mrs. A. B.* was alive and dwelling in the ſame pariſh of *D.* in *Ireland*, although ſhe was dead; and that one *Burrough*, by virtue of the ſaid forged affidavit and certificate, received of the ſaid *Mr. Saintbill* the ſum of eight pounds ten ſhillings, part of the ſame penſion (*a*).

O'Brian was found guilty upon this indictment, and being brought up from *Newgate* to the king's bench, and the Attorney-General demanding judgment againſt him, it was moved by SERJEANT HAYWARD and MR. KETTLEBY to arreſt it.

THE COURT. This is an indictment at common law upon which the priſoner ſtands convicted; and among others, the two principal reaſons given to arreſt judgment in this caſe are, FIRST, That even the forgery of ſuch an affidavit and certificate is no offence at common law, and ſhould have been proceeded upon on the ſtatute 33. *Hen.* 8. or ſome ſubſequent ſtatute upon forgery. SECONDLY, that if ſuch forgery be an offence at common law, yet the bare publication, of which *O'Brian* is only guilty, is not ſo. But we take this forgery to be an offence at common law, as it is to the prejudice of the king and ſubject, in cauſing a miſapplication of the public money; and we are juſtified in our opinion by the reſolution of *Lord Chief Juſtice* RAYMOND and the reſt of the Judges, in the caſe of *The King v. Ward* (*b*), where after conviction it was moved in arreſt of judgment, and the ſame exception taken as here, that it was a charge upon which an indictment would not lie at common law, it being only a forged indorſement upon paper, whereby *Ward* had entitled himſelf to a large quantity of alum; that it was a falſe token, and the indictment ſhould have been upon the ſtatute of 33. *Hen.* 8.; but the Court

over-ruled

(*a*) See the ſtatute 9. *Geo.* 3. c. 30. ſ. 6. and the caſe of Jones and Palmer, Caſes Cro. Law, 295.

(*b*) 13. *Geo.* 1. 2. Stra. 747. 2. Ld. Ray. 1461. Ray. Ent 538. 1. Barn. 10.

over-ruled the exception, and were of opinion, that the indorſement was to be conſidered as a writing upon which *Ward* was indictable at common law, it being of ſuch a nature whereby another perſon might be prejudiced; but if upon ſuch forged indorſement no prejudice could have ariſen to anybody, then it would have been no crime, and not indictable. The ſtatute of 33. *Hen.* 8. made no new offence, but only added a greater degree of puniſhment to the old ones (*a*); and this ſtatute, as well as ſeveral others that have created ſuperior kinds of puniſhment to offences that were ſuch at common law, have ſtill left the proſecutor the election of proceeding either upon thoſe ſtatutes or at common law: This was the reſolution in the caſe of *The King v. Ward*, and is ours in the preſent caſe. It has indeed been determined (*b*), that where a perſon got goods from a perſon on *Ludgate-hill* by a falſe verbal meſſage from *The Duke of Buckingham*, that he was not indictable at common law: and alſo reſolved in the caſe of *The King v. Newney (c)*, that a bare falſe affirmation does not amount to any crime indictable at common law, for people muſt not be ſo imprudent as to credit meſſages or affirmations by word of mouth. But when ſuch a fact as this of *O'Brian*'s appears upon an indictment, which is not the caſe of words, but is a matter in writing, which bears the greateſt probability of being true, and againſt which it is not in the power of a perſon to defend himſelf, it is indictable at common law; and it would be a reflection on the common juſtice of the nation to ſay it could overlook ſuch an offence as this.

What is ſufficient *publication* in forgery.

As to the latter objection WE ARE ALSO OF OPINION, that the publication of ſuch a forgery as this is indictable at common law. Indeed if *O'Brian* had not known the affidavit and certificate to be forged, and had innocently publiſhed and delivered them to *Burrough* as authentical ones, and *Burrough* had thereupon received part of the penſion, *O'Brian* had not been guilty of any offence; but the indictment charges, and it was proved upon evidence, that *O'Brian* knew them to be forged when he publiſhed them; ſo the intention and knowledge plainly conſtitute the offence, and make it puniſhable at common law; and it is clear that the publiſher of a libel is puniſhable as well as the author.

If an *affidavit* and *certificate* are neceſſary to perpetrate a fraud, the *forgery* of the one and the *publication* of the other is *one offence*.

There was ANOTHER OBJECTION, that the publiſhing the affidavit and certificate are ſeveral offences, and ſhould not have been charged in one and the ſame indictment. This objection would have been of weight, if the affidavit and certificate had been ſeveral offences, and could have had independent puniſhments: BUT WE ARE OF OPINION, that no part of the penſion could have been received without both an affidavit and a certificate of the widow's being alive, both being required by the treaſurer of the king's bounty; if ſo, theſe are not ſeveral independent offences,

(*a*) See . Term Rep. .

(*b*) Rex *v.* Pinckney, 1. Seſſ. Caſes, 198, c. 172.

(*c*)

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but are only two different facts that are conſtituent parts of one and the ſame crime.

Judgment on a conviction of forgery at common law.

The judgment was, First, To be carried by the marſhal through all the courts in *Weſtminſter Hall*, with a paper fixed on his forehead deſcribing his offence; Secondly, To be impriſoned for one year without bail or mainprize; Thirdly, After impriſonment to find one thouſand pounds ſecurity for his good behaviour for ſeven years, *viz.* five hundred pounds himſelf, and two ſubſtantial ſureties two hundred and fifty pounds a-piece; and to be re-impriſoned until ſuch ſecurity found.

O'Brian was found guilty upon another indictment for a ſecond offence of the ſame nature; and the judgment upon the ſecond conviction was, that *O'Brian* ſtand in the pillory at *Charing Croſs* for one hour, between the hours of twelve and three, and to be fined five pounds.

The marshal, in purſuance of the ſentence, took *O'Brian* out of court, and returned with him with a large parchment fixed round his head, on the fore-part of which his offence was written in very large characters. *O'Brian* ſtood upon a bench, at the back ſide of the counſellors bar, for about half a minute, and then the Chief Juſtice ordered him to be withdrawn and carried through the other courts, which the marſhal accordingly did, and then took him to his impriſonment.

Caſe 325.

Morgan *againſt* Griffith.

A replevin bond is good, although it do not appear to have been taken by the ſheriff *virtute officii.*

THIS is an action by *Paul Morgan*, ſheriff of *Monmouthſhire*, upon a replevin bond entered into by the defendant. *Oyer* was prayed of the condition, which upon reading appeared to be, " that *Morgan Bray* do and ſhall, at the next court of the ſaid " *Paul Morgan*, the ſheriff, cauſe to be proſecuted with effect " the plaint of *Thomas Thomas*;" and then the defendant *Griffith* pleaded a plaint levied by *Morgan Bray*, at the next county court, againſt the ſaid *Thomas Thomas*, and made that a performance of the condition. The plaintiff, to ſhew a breach, replied, and ſet forth the further proceedings on this plaint, that there was a *recordari facias loquelam*, upon which the plaint was removed into this court, and that judgment was thereupon given againſt the plaintiff in replevin by default: the replication goes on further in theſe words, " and ſo the ſaid *Thomas Thomas* ſays, that " the ſaid *Morgan Bray*, in the condition named, has not proſe- " cuted the ſaid plaint with effect, and this the ſaid *Paul Morgan* " is ready to verify." Mr. Robinson took many exceptions to theſe proceedings, as they appear upon this record:

First, That it is not ſet forth in the declaration, that this bond was entered into to *Paul Morgan* in the name of the ſheriff, and that ſuch bond is void if not taken in the name of office.

The

MORGAN *againſt* GRIFFITH.

THE COURT (*a*). It is clear indeed that in an action for taking bail on the ſtatute 23. *Hen.* 6. the bond muſt appear to the Court to be taken *virtute officii*, becauſe the ſtatute makes bonds otherwiſe taken void, but no ſtatute interpoſes in the preſent caſe: AND THE QUESTION is, Whether this bond, upon *oyer*, appears to be taken in the name of office? AND WE ARE OF OPINION that it does appear to be ſo taken, becauſe the word "ſheriff" is interſperſed through the condition; as that if judgment be againſt the plaintiff, he will return the goods replevied to *the ſheriff*, and that he will indemnify *the ſheriff*, *&c.* which are ſufficient tokens that the bond was taken by the ſheriff in his public capacity: beſides there has been no caſe cited to ſhew that it is neceſſary at common law, to ſet forth in the declaration that the bond was given to *Morgan* by the name of ſheriff.

In what caſe a *retorn. habend.* is not neceſſary.

ANOTHER EXCEPTION is, That there is no *retorn. habend.* upon the judgment in replevin againſt the plaintiff.

See Gilb. Rep. 95.

AND WE ARE OF OPINION that there is no occaſion in the preſent caſe for one; for in all replevin bonds there are ſeveral independent conditions; one to proſecute, another to return the goods replevied, and a third to indemnify the ſheriff; and a breach may be aſſigned upon any of theſe diſtinct parts of condition; and the breach aſſigned in the preſent caſe is, that the plaintiff in replevin did not proſecute with effect; ſo that a *retorn. habend.* is not at all material upon the breach in this caſe.

A clerical miſtake in an immaterial part of a replication, will not vitiate it.

A FURTHER EXCEPTION is to the replication, that it is bad, becauſe *Thomas Thomas*, who is a ſtranger to the record, ſpeaks in one part of it and ſays, that *Morgan Bray* has not proſecuted the plaint with effect.

BUT WE ARE OF OPINION that this is a miſtake in the clerk, and that it does not vitiate the replication, for it is immaterial and no more than ſurpluſage; for there appears to the Court, upon the former part of the replication, a ſufficient breach of the condition, for it ſets forth a judgment upon the *recordari facias loquelam* againſt the plaintiff in replevin; and there appearing to us ſuch a breach, we will make the ſame inference as *Thomas Thomas* has done, though it had not been expreſſed in the replication at all.

A replevin bond can only be diſcharged by a ſucceſsful proſecution of the ſuit.

THE LAST EXCEPTION to the plaintiff's recovering is, that the condition of the replevin bond has been anſwered by the levying of the plaint in the county court.

But we can ſee no foundation for that, for in all theſe ſorts of bonds, to proſecute with effect, the plaintiff muſt not only proceed

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(*a*) LEE, *Chief Juſtice*, in Michaelmas Term, 14. *Geo.* 2. delivered this opinion of the Court, which conſiſted of PAGE, and CHAPPLE, *Juſtices*; PROBYN, *Juſtice*, being removed from this court to be Chief Baron of the Exchequer; and WRIGHT, *Juſtice*, who was appointed in his ſtead, not having yet taken his ſeat.

to a deciſion of the ſuit, but muſt have ſucceſs in it, or he does nothing; and it is not a completion of the condition to have levied a plaint in the county court, for the words extend to all the proceedings from the original to the concluſion of the action, as well in the court below as in the ſuperior court, by *recordari facias loquelam*, which is the caſe in *Carth.* 249. And there are ſeveral precedents of bonds with the like conditions as this, as 1. *Lutw.* 1687. *Dalton's Sheriff*, 440. *Lil. Ent.* 124. 174.

Caſe 326. The King *againſt* Seymour and Others.

An information for extortion granted againſt juſtices of the peace, for refuſing to grant licences to publicans unleſs on the payment of ten ſhillings although this had been the practice of the borough for twenty five years before.

1. Stra. 413.
2. Term Rep. 692.

SEYMOUR, *Boyce*, *Blatch*, and *Duffield* attended at the king's bench in order to receive judgment, upon their being found guilty upon ſeveral informations.

CHAPPLE, *the junior Judge*, having attended BARON CARTER, who tried the informations, reported to the Court, that there were three ſeveral informations, one againſt *Seymour*, and *Boyce*, a juſtice of peace; another againſt the ſame *Seymour*, and *Blatch*, a juſtice of the peace; and a third againſt the ſaid *Seymour*, and *Duffield*, a juſtice of the peace.

The offence ſtated in the information, was matter of extortion uſed by *Seymour* and the three juſtices againſt ſeveral foreigners who were ſettled in the corporation of *Colcheſter*, and who had applied to thoſe three juſtices for licences to ſell ale.

The proceedings were thus: *Seymour* and theſe three juſtices met in order to grant licences to ſell ale; when the burgeſſes applied they had their licences upon the common and ordinary terms, but when any foreigner came for a licence, the conſtables who were ſtationed to guard the outward door ſuffered none but the foreigner who applied for a licence to enter into the firſt room, where *Seymour* was; and the general queſtion *Seymour* put to the foreigner was, Whether he was willing to pay ten ſhillings for his licenſe? If he refuſed he was diſmiſſed, but if he agreed to pay it to *Seymour* his ſureties were called, and he was admitted to go along with them into the room to the three juſtices, where his recognizance was taken and his licence granted. Theſe informations were tried by three ſpecial juries of gentlemen; the facts charged were very fully proved upon the trial; and there were above one hundred licences granted at the rate of ten ſhillings a-piece.

When CHAPPLE, *Juſtice*, had certified as above, SERJEANT PRICE and MR. BOOTLE moved, in mitigation of the fines that ſhould be ſet by the Court, upon ſeveral affidavits to ſhew *quo animo* the fact was done, as that ſuch fines had been taken for twenty-five years paſt; that this whole procedure was by the conſent and direction of all the other ruling members of the corporation; and that the money was applied to public uſes, as for repairing bridges, ſtreets, &c.

The King *againſt* Seymour and Others.

The Court ſuffered the affidavits to be read, though it was oppoſed by the Counſel on the other ſide (*a*).

The Court. This crime appears upon the informations, and the affidavits for mitigation, to be of a very high nature; for here are three juſtices, who are intruſted by the act of parliament of the 5. & 6. *Edw.* 6. c. 25. with a diſcretionary power to grant or refuſe licences to the perſons who apply for them (*b*), for each of which the ſtatute allows one ſhilling. It appears there were ſeveral applications made for licences, and that the juſtices granted them to anybody that was willing to pay ten ſhillings, without any regard to the perſon, whether he was qualified within the intent of the act or not (*c*). There was indeed a diſtinction made between townſmen and foreigners, the latter being obliged to pay much more than the former; and there is no doubt but that by the by-laws of a corporation, in a great many inſtances, foreigners may be obliged to pay greater fees than the townſmen, as for the ſetting up of any trade, &c. but ſelling of ale is not a trade, or the ſubject matter of any by-law. Licenſing public-houſes is a truſt repoſed in juſtices of the peace by the Legiſlature, and when they execute it in this extraordinary manner, neither the cuſtom of doing it for twenty-five years before, nor the application of the money to public purpoſes, nor the conſent of the other ruling members of the borough, can excuſe theſe juſtices from the cenſures of this Court.

Therefore the three juſtices muſt be fined one hundred pounds each, and *Seymour*, who appears to be an agent or inſtrument to the juſtices, muſt be fined one hundred and twenty pounds, *viz.* the ſum of forty pounds on each information.

The juſtices and *Seymour* had in court all the fine money, except one hundred pounds, which they offered to pay;

But **the Court** ſaid, Let them be gentlemen of ever ſo large a fortune, they muſt pay the whole fine in court or be committed, and checked one of the clerks in court for propoſing to undertake for the payment of the one hundred pounds. The juſtices then paid the three hundred and twenty pounds, and gave their note for the remaining one hundred pounds, which was accepted by the Court as payment.

(*a*) See Anonymous, ante, 85. and Rex *v.* Sharpneſs, 1. Term Rep 228.

(*b*) See now the ſtatute . Geo. 2.

(*c*) See Rex *v.* Filewood, 2. Term Rep. 145. and Rex *v.* Holland, 1. Term Rep. 692.

The Caſe of the Lieutenancy of London;

OR,

The King *againſt* Evindon.

Caſe 327.

LEE, *Chief Juſtice*, delivered the opinion of the Court upon the caſe, after ſeveral arguments at the bar, in the following manner: This is a motion for a writ of privilege to be granted to

An attorney in *London* was formerly exempted from ſerving in the *militia*:—What ſhall be conſidered a *perſonal ſervice*?—S. C. 2. Stra. 1143.

THE CASE OF THE LIEUTENANCY OF LONDON; OR, THE KING *againſt* EVINDON.

Mr. Evindon, an attorney of this court, and a houſekeeper in the city of *London*, to exempt him from ſerving in the city militia. This motion is grounded upon a ſummons from the commiſſioners of the Lieutenancy there, by which *Mr. Evindon* is required to provide arms, and to appear along with the reſt of the city militia, to be reviewed and to exerciſe, &c. Upon our granting a rule to ſhew cauſe why this writ of privilege ſhould not iſſue, two objections were ſtarted; the one, that the ſervice required in the militia is not properly a perſonal ſervice; the other, admitting it to be a perſonal ſervice, that it is not ſo neceſſarily perſonal but that it may be ſerved by deputy. As to the former objection, it appears in the firſt place from the ſummons itſelf, that the ſervice is perſonal, for it requires *Mr. Evindon* to appear perſonally, in arms, to be muſtered along with the reſt of the militia, &c. But to ſupport this objection, mention was made at the Bar of ſeveral very ancient commiſſions of array, in which this ſervice was not conſidered as perſonal; for that by them whole counties, and particular men of great intereſt and fortunes were compelled to raiſe a certain number of men without being obliged to be ſoldiers themſelves. This we allow to have been ſometimes the caſe before the ſtatute of 25. *Edw.* 3. c. 8. but by that ſtatute it is enacted, "that no man ſhall be conſtrained to find men of arms other "than thoſe which hold by ſuch ſervice, if it be not by common aſ"ſent of parliament." This act was made to prevent the Crown forcing men to find ſoldiers, who were not obliged by any ſervice or act of parliament to do it. And it appears by the preamble to the ſtatute 4. & 5. *Ph. & Mar.* c. 3. that this ſervice is perſonal, for it takes notice that the men to be raiſed are to be the moſt able men, and it was to prevent the releaſing of ſuch men, and the taking in their room people of leſs ſtrength, that this ſtatute was made. As to the ſtatute 13. & 14. *Car.* 2. c. 3. which was made for ordering the forces in the counties at large, how far that has made ſuch ſervice in the militia not to be perſonal, people's properties and fortunes being charged and not their perſons, we think foreign to the preſent queſtion; for in the ſame act of parliament there is a ſpecial proviſo, by which the city of *London* is to raiſe its forces as in former times (*a*), notwithſtanding that ſtatute, and therefore this ſervice is to be conſidered as perſonal; and then there can be no room to doubt but that attornies are, by the common cuſtom of the realm, exempted from it, becauſe they cannot attend the field and the court at the ſame time; and this reaſon is given in the recitals of theſe writs of privilege which have been granted, *viz.* becauſe of the oath by which they are bound to ſerve the king and his people in the courts of juſtice, purſuant to the rights which the king and the ſubject have in their ſervice as attornies of this court; and the authorities where attornies have been excuſed in inſtances that require perſonal attendance are, 1. *Vent.* 16. 29. and *Prowſe's Caſe* (*b*).

As to the other objection, it is not ſo certain that deputies will do in a duty of this nature, and if there were times of danger, it

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(*a*) See the ſtatute.

(*b*) Cro. Car. 389.

would

THE CASE OF THE LIEUTENANCY OF LONDON; OR, THE KING *againſt* EVINDON.

would be no eaſy matter to get a repreſentative, in which caſe a man muſt be compelled to ſerve himſelf; but ſuppoſing deputies will do, yet even that, in our opinions, will not make any alteration. The caſe in *March's Rep.* 30. in which the following diſtinction is taken, *viz.* that in a perſonal ſervice an attorney ſhall not be conſtrained to act, but if it can be ſerved by deputy he ſhall not be excuſed, appears to be the ſame caſe with that in 2. *Roll. Abr.* 272. *pl.* . It does not appear in *March* by whom it was ſaid, that an attorney ſhall not be privileged from an office which may be ſerved by deputy; but in *Roll's Abridgment* notice is taken that it was ſaid by *Juſtice* JONES only: but, notwithſtanding this caſe, there is an authority of a ſubſequent date that an attorney ſhall be excuſed from offices, though they may be ſerved by deputy, 1. *Lev.* 265, 266.; for though a deputy may do, yet the principal ſhall be anſwerable for his miſbehaviour. And the caſe in *Cro. Car.* 11. is in point to the preſent caſe, for there a writ of privilege was ſigned by all the Juſtices of the common pleas to free one *Venables*, a clerk under the *Cuſtos Brevium*, from being a ſoldier; and the writ recites, that it is the immemorial cuſtom of the Court, that neither attornies nor clerks of the court ſhall be preſſed for ſoldiers, nor elected to any office without their conſent, for that they ought to attend the ſervice of the court; and there are precedents of ſuch writs of privilege to diſcharge clerks from being preſſed for ſoldiers in *Co. Ent.* 436. *Officina Bre.* 164. 174.; and in *Queen Anne*'s time there was a writ of privilege, ſigned by *Lord Chief Juſtice* HOLT, to one *Smith*, and another by *Lord Chief Juſtice* RAYMOND to one *Skinner*, both which were to diſcharge them from ſerving as militia-men in *London*. We have had a conference upon this caſe with the Judges of the court of common pleas, who have been applied to for a like writ of privilege, and who have had the caſe ſpoken to before them ſeveral times as well as we, and it is the unanimous opinion of both Courts that attornies are entitled to ſuch writs of privilege.

Therefore this rule for the writ of privilege muſt be made abſolute (*a*).

(*a*) See ſame point, Heaton's Caſe, Barnes, 42.; but the Militia Acts now allow the perſon nominated to exempt himſelf from the obligation of ſerving, by the payment of ten pounds; and it is ſettled in Gerrard's Caſe, that an attorney is not intitled to a writ of privilege to exempt him from ſerving in the militia, it being no longer deemed a perſonal ſervice. 2. Bl. Rep. 1123. Mayor of Norwich *v.* Berry, 4. Burr. 2109.

The Ducheſs of Portland *againſt* Wynne. Caſe 328.

In what caſe the Court will refuſe to grant a *certiorari* to commiſſioners of ſewers.—4. Hawk. P. C. 144. ch. 27. ſ. 23.

THE DUCHESS OF PORTLAND laid out a conſiderable ſum in repairing ſea banks that lay between *Mr. Wynne*'s eſtate and her's, and then got an order of the commiſſioners of ſewers to charge *Mr. Wynne* with his contributory ſhare. *Mr. Wynne* applied to

Duchess of Portland *againſt* Wynne.

this court for a *certiorari* to the ſaid commiſſioners, to move all orders relating to the repair of all ſea banks, between the *Ducheſs of Portland* and himſelf, and alſo to the repairing of the eaſt and weſt marſh ſea banks, upon an affidavit, that all the ſaid ſea banks were in good repair, and that there could be no danger in removing the ſaid orders. Upon a rule to ſhew cauſe, *the Ducheſs* produced an affidavit, that ſubſequent to the rule granted the embankings of the eaſt and weſt marſh ſea banks were very much damaged from a very high ſpring tide.

The Court has always been cautious in letting theſe *certiorari's* take effect. It is upon this account that the application is always upon affidavit; and then there is a rule to ſhew cauſe why they ſhould not go; whereas in other caſes they go of courſe (*a*). And this rule is granted to the intent that the Court may judge, from what is offered by the other party, whether any inconvenience may follow upon the *certiorari* iſſuing: and further, upon the return, the *certiorari* is not filed without giving the party another opportunity of laying before the Court his exceptions; for if the orders removed be good, the Court may grant a *procedendo* before filing of them, which they cannot do afterwards (*b*); and the party alſo before filing may ſhew once more whether there may be ſtill any inconvenience that may ariſe to the properties of people lying upon the ſame level; for if any real danger ſhould be manifeſted to the Court, it will not ſuffer the orders to be filed, for thereby the hands of the commiſſioners are cloſed, and there will be a ſuſpenſion of their juriſdiction until this Court has come to ſome determination about thoſe orders, although the banks may be in the laſt danger, and want the interpoſition of the directors. In *June* laſt, it is ſworn, that the banks in the rule were in good repair; but ſubſequent to that it is ſworn, that the eaſt and weſt marſh ſea banks were very much damaged by a ſtrong tide. And the rule extends not only to remove the orders of the commiſſioners between *the Ducheſs* and *Mr. Wynne*, but alſo all orders relating to the eaſt and weſt marſh ſea banks, which appear to the Court to be in a very dangerous ſtate.

Therefore we cannot make this rule for a *certiorari* abſolute; for, ſuppoſe the commiſſioners upon this general rule had returned only the orders between *the Ducheſs* and *Mr. Wynne*, and had omitted certifying the orders relating to the eaſt and weſt marſh ſea banks, they would certainly have been in contempt. But if this general rule be withdrawn, we will not ſcruple to grant a *certiorari* to remove the orders between *the Ducheſs* and *Mr. Wynne* in regard to this contribution.

Therefore let the rule be diſcharged.

(*a*) See the caſe of the Commiſſioners of Sewers for Yorkſhire, 1. Stra. 609. Fort. 374. 8 Mod. 331.

(*b*) The writ may be taken off the file *quia improvidè emanavit*. 1. Burr. 488. 4. Burr. 2459. 2522. 4. Hawk. P. C. ch. 27. ſ. 63. notes.

Rouſe

Rouſe *againſt* Patterſon.

Caſe 329,

An action on the caſe lies againſt the ſheriff for taking inſufficient pledges in replevin without firſt ſuing out a *ſcire facias* againſt the pledges (*l*).

S. C. 1. Viner Abr. 399.
S. C. Bull. N. P. 60.

IN REPLEVIN, the ſheriff returned *averia elongata*; and an action being brought in the common pleas, wherein the plaintiff declared in an action on the caſe againſt the ſaid ſheriff of *Middleſex* for taking inſufficient pledges, the jury gave a verdict for the plaintiff, and found, that the pledges were inſufficient both at the time of taking them and afterwards; and judgment was accordingly given for the plaintiff. Whereupon a writ of error being brought in the king's bench, and the general errors aſſigned,

DENNISON *for the plaintiff in error* inſiſted, that an action upon the caſe will not lie againſt the ſheriff upon the ſtatute of *Weſtminſter the Second*, until a *ſcire facias* has been firſt brought againſt the pledges; for at common law, until the *ſtatute of Marlebridge*, the ſheriff could not take pledges by plaint, but only by writ (*a*); and that appears likewiſe by the ſtatute itſelf. The ſtatute of *Weſtminſter the Second* (*b*) ſets forth the duty of ſheriffs in taking pledges both to proſecute and for the return of the cattle, and their puniſhment for the breach of it, namely, that they ſhall anſwer *de pretio averiorum*, &c.; and where the ſheriff neglects to take pledges, he is puniſhable by amerciament (*c*); and there lies a writ of detinue, wherein the judgment is to recover the thing itſelf, or the value (*d*). But the regular method is not to proceed by action, but to ſue a *ſcire facias* againſt the ſheriff; and that is the ſpeedier remedy (*e*). The pledges required by the ſtatute of *Weſtminſter the Second* are taken for the benefit of him who makes the diſtreſs, namely, the avowant, and not of the ſheriff; and ſo it differs from pledges taken by the ſtatute of 23. *Hen.* 6. upon which no action lies for taking inſufficient pledges (*f*). A *ſcire facias* muſt be ſued out in this caſe (*g*). The caſe of *Sheers v. Mulſo* (*h*) ſhews, that pledges are for the ſecurity of the avowant, and muſt be proceeded againſt in the firſt inſtance; for the ſheriff is not liable until there appears a default in them. And it is like the caſe of bail, in which a *ſcire facias* does not lie againſt the bail until the default of the principal. The plaintiff muſt do every act that lies in his power; he muſt ſue out a *capias* againſt the principal before he can charge the bail, &c. for the recognizance of the bail, that the principal ſhall render himſelf, is intended by law to be upon proceſs awarded againſt him (*i*). The precedent in *Lilly's Ent.* 37. is a modern thing, and I believe of no authority. *Lord Coke* (*k*)

(*a*) Co. Lit. 146. b. Dyer, 246. pl. 76.

(*b*) Chap. 2.

(*c*) 4. Inſt. 180. 2. Roll. Abr. 259.

(*d*) Bro. Abr. "Plevin," pl. 4.

(*e*) See accordingly Year-Book 2. *Hen.* 6. pl. 15. a.

(*f*) 1. Saund. 59.; and ſee Etherick *v.* Cowper, 1. Salk. 99. and 1. Wilſ. 223. Cowp. 769.

(*g*) It is ſo ſaid in Theſaurus Brevium, 274.; and Skin. 244. 3. Mod. 56. Raſt. Ent. 569. Co. Ent. 637. are cited in ſupport of the aſſertion.

(*h*) Sheers *v.* Mulſo, Trinity Term, 4. *Geo.* 1. upon error out of the common pleas. Fort. Rep. 330.

(*i*) Cro. Eliz. 597.

(*k*) 2. Inſt. 340.

(*l*) If the ſheriff take inſufficient pledges *de retorno habendo*, the Court, on motion, will order him to pay the defendant the damages and coſts recovered, Richards *v.* Acton, 2. Black. Rep. 1220. But for neglecting to take a replevin-bond, the party muſt bring his action, Rex *v.* Lewis, 2. Term Rep. 617; and the ſum recovered ſhall be only to the amount of the diſtreſs, Yea *v.* Leathbridge, 4. Term Rep. 443.

comments upon this ſtatute, and ſays, that inſufficient pledges are as no pledges; which muſt be underſtood according to the ſubject-matter: And here it ought to appear that the pledges are inſufficient. *Moyle (a)* has the record and entry of the judgment in the Year-Book of *Henry the Sixth (b)*; and *Brooke (c)* abridges that caſe, and ſays, that judgment was againſt the ſheriff by default. The caſe of *Traverſe v. Mickleburn (d)* is recorded at large, with ſeveral notes, in *Moyle's Precedents (e)*; and the *Officina Brevium (f)* has a like precedent. The caſe of *Moyſer v. Gray (g)* was an action againſt the *Mayor of Beverly* for delivering the cattle without finding any pledges. But though it muſt be admitted that an action will lie againſt the ſheriff where there are no pledges, yet where there are pledges, their ſufficiency is not to be determined upon a collateral action. And it is to as good purpoſe to ſue ſufficient pledges as it is to iſſue a *capias* againſt the principal, who may perhaps be beyond ſea or inſolvent, in order to affect the bail. The law ſuppoſes that the principal may render himſelf, or pay the money, or get it paid for him; and it is ſtronger in a ſheriff's caſe, whom the law always ſuppoſes to be a reſponſible perſon, and one that may be found at any time; and therefore he, being an officer favoured in law, ought to be the laſt perſon againſt whom the action ſhould be brought.

DRAPER, *Serjeant*, *contra*. This caſe depends upon the conſtruction of the ſtatute of *Weſtminſter the Second*, in which there is not one word of a *ſcire facias* againſt the pledges; but it is provided, that in this caſe the ſheriff himſelf ſhall anſwer *de pretio averiorum*. If the replevin be by plaint, no *ſcire facias* can iſſue upon it; the conſequence of which is, that there muſt be an action, for otherwiſe the party would be without remedy. There is no difference between a replevin by writ and a replevin by plaint. It is laid down in 2. *Inſt.* 340. that if the ſheriff return inſufficient pledges, they are no pledges within the ſtatute, and that, in ſuch caſe, the ſheriff ſhall be charged by this act as if he had taken no pledges at all. Detinue cannot lie *de pretio averiorum*, &c. But where the ſtatute ſays of the ſheriff "*reſpondeat ipſe de pretio averiorum*," thoſe words are ſufficient to give an action; as in the *ſtatute of Wincheſter*, of HUE AND CRY, which ſays, "the county ſhall anſwer, "&c." An action has been brought againſt the ſheriff not only for not taking *pledges (i)*, but for not taking *ſufficient pledges (k)*; and no mention is made in either of the caſes of a *ſcire facias*. Where an affirmative ſtatute gives a remedy, and does not ſay that there ſhall be no other, the common law, in the caſe which has been put of bail, affords a remedy. So if the party be damaged by the ſheriff's neglect, the common law will give him a remedy;

(a) Moyle's Precedents, 58. title "Scire Facias."

(b) 2. *Hen.* 6. pl. 15.

(c) Bro. Abr. title "Pledges."—See alſo Fitz. N. B 74.

(d) Hutt. 77.

(e) Moyle's Prec. 166.

(f) Officina Brev. 243.

(g) Cro. Car. 446. S. C. Jones, 378.

(h) 2. Inſt. 340.

(i) Brownl. Red. 25.

(k) Lilly Ent. 37.

though it is inſiſted, that the ſtatute of 23. *Hen.* 6. does not come up to this caſe, becauſe here the pledges are only for the avowant's ſecurity, whereas they are both for the party's and ſheriff's ſecurity. And actions have been brought againſt the ſheriff that he may anſwer ***de pretio averiorum (a)***. But if it were an action on the caſe, yet it would lie. And an action upon the ſtatute of HUE AND CRY has been called an action upon the caſe.

LEE, *Chief Juſtice.* This is a hard caſe upon the ſtate of it. The conſideration is, Whether, upon the foundation of law, in an action on the caſe upon this ſtatute, there is not ſufficient reaſon to maintain this action as it is brought? The plaintiff's declaration has ſet forth the whole proceeding; and upon the return "*eloined*," the action is brought againſt the ſheriff for taking *inſufficient pledges*. The ſtatute of *Weſtminſter the Second* intends pledges for the ſecurity of the diſtrainer, according to *Cro. Car.* 446. and *Jones*, 378. which is the ſame caſe. If the ſheriff take no pledges at all, an action on the caſe lies againſt him; there is no caſe to the contrary ſince 2. *Inſt.* 340.; and inſufficient pledges are no pledges. MR. DENNISON has ingeniouſly endeavoured to diſtinguiſh between the ſheriff's taking inſufficient pledges and his taking none at all; but 2. *Inſt.* 340. is expreſsly, that they are the ſame thing. Precedents have been cited in this caſe, but no determinations to warrant that the pledges muſt be proceeded againſt firſt; and therefore, though the party may proceed againſt the pledges at firſt, yet if the ſheriff take inſufficient pledges they are as none, and it is a direct breach of the ſtatute. This is different from the caſe to which it has been compared in *ſcire facias* againſt bail, which depends upon the terms of the recognizance, and the conſtruction which the Court makes upon it in favour of the bail. Therefore, as at preſent adviſed, I think, upon the caſe in 2. *Inſt.* 340. and *Cro. Car.* 446. there being no authority to the contrary, that this action does very properly lie upon the ſtatute of *Weſtminſter the Second* without firſt ſuing a *withernam* or *ſcire facias* againſt the pledges.

PAGE, *Juſtice.* I am clearly of the ſame opinion; and the Court was of this opinion upon the former argument, if my notes are true, &c.

PROBYN, *Juſtice*, was abſent, on account of the bad ſtate of his health.

CHAPPLE, *Juſtice.* I remember ſeveral caſes of this nature upon a *ſcire facias* in the common pleas. It has been held in the latter caſes, that no action lies againſt the ſheriff for taking but one bail; or for putting in inſufficient bail. I ſhould be glad, therefore, to look a little further into this matter, and to conſider whether this action is maintainable or not; for if, by another kind of proceeding, the very cattle can be returned, no action can lie againſt any one.

(a) March, 46. Cro. Car. 594.

ROUSE against PATTERSON.

LEE, *Chief Juſtice.* Let this caſe ſtand over then, and we will conſider of it.

It was argued again in *Hilary Term* 1739 as follows:

WYNNE, *Serjeant, for the plaintiff in error*, inſiſted upon two points: FIRST, That an action on the caſe will not lie, becauſe this queſtion ariſes upon two points upon the ſtatute of *Weſtminſter the Second*, c. 2. which was a new proviſion, and not at common law; for the ſtatute of *Marlebridge* (*a*), which gives replevin, does not oblige the ſheriff to take pledges; but at common law they were to be taken, that the king might be anſwered for the amerciament (*b*). And this ſtatute does not give an action on the caſe; for though it is an affirmative ſtatute, yet being a new proviſion it implies a negative (*c*). And there is no expreſs reſolution that an action on the caſe will lie upon this ſtatute, but the action ought to be detinue, or *ſcire facias* (*d*). And upon ſuch action the goods are to be reſtored, if poſſible; if not, *ad valorem*.

SECONDLY, The party has not done what was neceſſary to intitle himſelf to this action, for he ought firſt to have ſued a *ſcire facias* againſt the pledges, and not brought an action on the caſe againſt the ſheriff in the firſt inſtance. According to 2. *Inſt.* 340. if, upon the writ to have return of the beaſts from the pledges, the ſheriff returns "*nihil*," then the plaintiff may have a *ſcire facias* againſt the ſheriff *quòd reddat ei tot averia* or *tot catalla* (*e*). By the ſtatute of *Weſtminſter the Second*, if the ſheriff take inſufficient pledges, or none, the party ſhall, upon a *ſcire facias*, have *tot catalla*, *&c.* So he ſhall againſt the bailiffs of a franchiſe. But none of theſe caſes ſo much as mention an action on the caſe. The *Officina Brevium*, 243. ſets forth the form of the *ſcire facias*, and proceedings in replevin agreeable thereto. In *Officina Brevium*, 305. no pledges were taken. In *Donington v. Edwin* (*f*), the pledges were proceeded againſt firſt. The ſheriff is remedileſs againſt the avowant and the pledges; and on the other hand it is but reaſonable, that the pledges ſhould have an opportunity of pleading. They may plead in abatement; they may plead a tender, refuſal, &c. *Co. Ent.* 637. *Skin.* 244.; which is warranted by the reaſon of the law in other caſes, *Cro. Car.* 295. So that in this action the ſheriff is chargeable with damages and coſts without remedy over, whereas in a *ſcire facias* he is not chargeable with damages, *Br. Damages*, *pl.* 3. And as this act of parliament, though four hundred and ſixty years old, has never yet produced an action on the caſe, it is ſtrongly to be preſumed that no ſuch action will lie. *Litt. ſect.* 108.

MR. HOLLINGS *for the defendant in error.* The declaration charges, that the pledges were inſufficient at the time of the taking, and are ſo ever ſince, &c. The caſes which ſay a *ſcire facias* lies

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(*a*) 2 Inſt. 139.

(*b*) 4. Inſt. 180. and *per* HOLT, *Chief Juſtice*, in Roberts *v.* Savile, 5. Mod. 408.

(*c*) Hob. 298. Plowd. 113, 206.

(*d*) Bro. Abr. "Detinue," pl. 6, Dalton's Sheriff, 273. 433.

(*e*) Bro. Abr. "Scire Facias," 3.

(*f*) 3. Mod. 56.

againſt the ſheriff do not ſay that an action on the caſe will not lie. Where the replevin was by plaint, no *ſcire facias* lay (*a*); and therefore an action on the caſe muſt have lain, that the party might not be without the remedy. That the party may bring detinue, or that detinue uſed to be the action, is no argument that an action on the caſe will not lie; for actions on the caſe are often brought now where anciently another kind of action was uſed: as an aſſize of nuſance is now changed to an action of treſpaſs, &c.; and at the time of making the ſtatute of *Weſtminſter the Second* actions on the caſe were not in frequent uſe, as they are now. Beſides, it has been adjudged that this action lies. In *Moyſer's Caſe* (*b*) it is held by the whole Court, that it is at the ſheriff's peril to take ſufficient pledges; and an action on the caſe will lie where he takes no pledges (*c*). Upon the former argument it was admitted, that an action on the caſe would lie; only it was objected, that a *ſcire facias* ought to be firſt brought; but in this caſe it would be to no purpoſe to bring a *ſcire facias* againſt pledges who have been found to be inſufficient continually, &c. There is no difference between inſufficient pledges who have been found inſufficient, and no pledges at all; for if the ſheriff return inſufficient pledges, they are no pledges within this ſtatute. And in ſuch caſe the ſheriff ſhall be charged by this act as if he had taken no pledges at all. It is no objection to this action that it makes the ſheriff liable to damages, for otherwiſe how could the party be anſwered *de pretio averiorum*. In the caſe of *Aſper v. Buſhnell* (*d*), an action was brought for taking the plaintiff's pheaſants; and the Court intended them to be dead pheaſants to ſupport a verdict. An action was brought (*e*) for taking the plaintiff's fiſhes *ſeparali piſcariâ*; and the Court intended it to be a ſtewpond, becauſe after a verdict the Court will admit any intendment to ſupport it. In the caſe of *Baule v. Knight* (*f*), a policy of inſurance omitted the time when the riſque was to begin; and though that caſe was adjourned, yet the Court ſaid, that everything ought to be intended to ſupport the verdict. As to what the pledges might have pleaded, as tender, &c. the ſheriff might have taken advantage of that himſelf, &c.

LEE, *Chief Juſtice*. Upon this argument there are two exceptions taken: FIRST, That an action on the caſe will not lie; or, SECONDLY, That a *ſcire facias* ought to have been firſt brought. This caſe depends upon the ſtatute of *Weſtminſter the Second*, which directs all ſuch officers to take ſufficient pledges, and ſays, "*quòd ſi quis alio modo plegeos ceperit. reſpondeat ipſo de pretio averiorum.*" As to pledges at common law, they were only to render the ſheriff amenable, that he might be amerced. And as to the objection that an action on the caſe does not lie, it is only ſaid in the Books, that either *ſcire facias* or *detinue* may be brought

(*a*) 2. Inſt. 340.

(*b*) Cro. Car. 594. 2. Roll. Abr. 259.

(*c*) Cro. Car. 446. S. C. W. Jones, 378.

(*d*) Ray. 16.

(*e*) 1. Vent. 122.

(*f*) Eaſter Term, 4. Geo. 2.

ROUSE *againſt* PATTERSON.

againſt the ſheriff; but in the caſe that has been cited from *Cro. Car.* 446. and that is the only one, an action on the caſe was brought for taking inſufficient pledges; and there the Court took it for granted that an action on the caſe lay; but the queſtion was, Whether taking money was as well as pledges? and they held that it was not, becauſe the party may have a *ſcire facias* againſt the pledges; but it is not to be inferred from hence that no other action may be brought. No pledges and inſufficient pledges are ſaid to be the ſame thing in 2. *Inſt.* 340. which I underſtand to be meant as to the ſheriff's obedience to the act; and therefore I do not ſee but that there is a ſufficient foundation to hold that an action on the caſe will lie. As to THE OTHER POINT, There is no doubt but *detinue* will lie againſt the ſheriff. But as no caſe has determined that an action on the caſe will not lie, and my *Lord Coke* holds that inſufficient pledges are none, it ſhould ſeem that this action is properly brought. I do not ſee that this caſe would be helped by the verdict, if that aſſiſtance were neceſſary; for there would need no proof before the jury of a *ſcire facias*, but only of the fact of the pledges' inſufficiency. As to damages, the ſtatute expreſsly gives a remedy for the cattle, or *de pretio averiorum*, *&c.* In the 4. *Hen.* 6. 16. *b.* it was a queſtion, Whether an action would lie againſt an executor for a *devaſtavit* returned? and BABINGTON, *Juſtice*, compares it to a ſheriff's caſe, &c. wherein, he ſays, it is uſual to have a *ſcire facias* againſt the pledges, or an action may be brought againſt the ſheriff upon ſuggeſtion of the matter; which I take to be the preſent caſe. And therefore, as at preſent adviſed, ſeeing no caſe for it, I know no reaſon to ſhew ſo great favour to a delinquent ſheriff. But as I do not deſire to reſt this upon my opinion, if my Brothers have any doubt, I ſhall be glad to conſider further of it.

PAGE, *Juſtice.* Upon the former argument I was of opinion that the action was well brought, nor do I ſee any reaſon to alter my opinion. An action on the caſe lay againſt the ſheriff before the ſtatute, and the act takes away no remedy; and therefore I agree with MY LORD.

PROBYN, *Juſtice.* I am of the ſame opinion, and incline to think, that this action does lie. That it lies where no bail at all was taken, is warranted by *Cro. Car.*; and my *Lord Coke* ſays, that inſufficient bail is the ſame thing. Actions on the caſe were but ſeldom uſed formerly; and it is for that reaſon that this act ſeems to point at the remedy that was then moſt in uſe.

CHAPPLE, *Juſtice.* I am of the ſame opinion. It ſhould ſeem to me not to be neceſſary to have a *ſcire facias* againſt the pledges to entitle the party to his action againſt the ſheriff. In the caſe of an action againſt the indorſor of a bill of exchange, it has been determined, that it need not be alledged in the declara-

tion

ſion that there has been any default in the drawer (*a*). In *Latch*, 159. there was an action on the caſe for not taking pledges, &c. and *Comb*. 228. appoints a better way than taking pledges.

Rouse *againſt* **Patterson.**

Lee, *Chief Juſtice*. The judgment muſt be affirmed.

(*a*) Branley *v*. Fraſier, 1. Stra. 441. Lawrance *v*. Jacob, 1. Stra. 515. Lake *v*. Hayes, 1. Atk. 281. But on a *promiſſory note* a demand in ſuch caſe muſt appear to have been made on the drawer, Sidebotham *v*. Smith, 1. Stra. 649. Collins *v*. Baker, 2. Stra. 1089. Prado *v*. Fuller, Comy. Rep. 579. Heylin *v*. Adamſon, 2. Burr. 669. Lambert *v*. Oakes, Ld. Ray. 443.

The King *againſt* Sparrow and Others.

Caſe 330.

A MANDAMUS was directed to the defendants, being bailiffs of *Ipſwich*, and as ſuch acting as juſtices of the peace there, commanding them to appoint two or more overſeers of the poor of the ſaid place, or to ſhew cauſe to the contrary, &c.

Mandamus dated the thirteenth of *June*, commanding the juſtices to appoint overſeers, is good, although by the 43. *Eliz*. c. 2. they are to be appointed within a month after *Eaſter*, and *Eaſter Day* in that year was on the twenty-ſecond of *April*.

The defendants returned, that they had appointed three ſubſtantial houſholders therein mentioned, according to the ſtatute, as by the ſaid writ they were commanded. The writ of *mandamus*, in this cauſe, bore *teſte* the thirteenth of *June*, and *Eaſter* was on the twenty-ſecond of *April* in the ſame year.

S. C. 2. Stra. 1123.
S. C. 2. Seſſ. Caſ. 184. 140.
S. C. 1. Conſt. 17. pl. 23.

Mr. Solicitor General moved, that the writ of *mandamus* and the return might be quaſhed, as not being made purſuant to the ſtatute, which appoints overſeers of the poor to be nominated "in *Eaſter week*, or within one month after *Eaſter*;" and as this appointment was made without the month after *Eaſter*, the writ of *mandamus* is *felo de ſe*, and ought to be quaſhed. This Court will take notice of the Calendar, which is part of the law, and has been ſo determined over and over (*a*). In the caſe of *Hoile v. Lord Cornwallis* (*b*) the Court judicially took notice that the fifteenth of *June* was on a *Sunday*, and held that the Calendar was part of the law of the land. The common law knows no ſuch officer as an overſeer of the poor merely as ſuch; the churchwarden was overſeer *ex officio*; and therefore, as it is an office created by ſtatute, the ſtatute muſt be complied with; as where this ſtatute requires the overſeer to be a ſubſtantial houſholder, he muſt be ſuch, or elſe he is incapable of the office; and it has been often determined ſo (*c*). This is not like the caſe where a court leet may be held at other times than limited, which is at common law. If the month is to be pretermitted, the conſequence is, that the churchwardens will be overſeers in the mean time. There is a penalty for not complying with the time in the act, and it is no defence to an action brought for it, that they obeyed the act after the time; and the

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(*a*) See the caſe of Harvey *v*. Broad, 2. Salk. 626. 6. Mod. 41. 81. 148. 160. 252.

(*b*) Hoile *v*. Lord Cornwallis, Trinity Term, 6. *Geo*. 1. 1. Stra. 387.

(*c*) See 1. Conſt's Poor Laws, 1 to 5. where all the caſes reſpecting the form and manner of appointing overſeers are collected and arranged.

The King *againſt* Sparrow and Others.

making a penalty, ſhews that the legiſlature intended that they ſhould not exceed the time limited in the act. If one month is to be omitted, another month may be omitted, and ſo on for ever. If the juſtices cannot exerciſe their authority after the time appointed by the act, *a mandamus* of this Court, which is only to inforce an authority, will not give them a power to appoint the overſeers after the time. Numbers of orders have been quaſhed only becauſe the ſeſſions were not held within the proper time (*a*). Here the ſtatute gives the juſtices an alternative; the appointment of overſeers may be either at one week or another, *viz.* either in *Eaſter* week or a month after. But where a ſtatute creates an offence, it muſt be ſtrictly purſued, and affirmative directions imply a negative that they ſhall not be exceeded. And therefore the *mandamus* being after the proper time, the writ and return ought to be quaſhed; for it ſhould have been moved for within the month, which is the proper time.

Mr. Hollings *contra.* The 43. *Eliz.* c. 2. gives the juſtices a power to appoint overſeers, but that does not create any new power, becauſe the juſtices had ſuch a juriſdiction at common law; and the time, in this caſe, is only directory: when the time in the ſtatute is elapſed, there is no pretence to ſay the time is infinite, becauſe the Court can grant a *mandamus.* The power of the juſtices continues the whole year, and there are no negative words in the ſtatute, as, "at no time after," or the like; ſo that they are not ſtrictly tied up to time. They may bind apprentices for a leſs time than that mentioned in the fifth ſection of this ſtatute, which has been held to be only directory (*b*): and, according to my Lord Coke, one part of a ſtatute muſt be expounded by another. A quarter ſeſſions may quaſh a rate made by the churchwardens and make a new one (*c*). Where the ſtatute of 18. *Eliz.* c. 3. appoints that the orders concerning baſtards ſhall be made by the juſtices "in, or next to, the limits of the pariſh where ſuch child "was born," that has been held to be only directory (*d*). It has been held that a pariſh that is parcel of a rectory is within the ſtatute 43. *Eliz.* c. 2. and ſhall have overſeers, &c. (*e*). According to *Plowden*, in explaining acts of parliament the words are FIRST to be conſidered, and SECONDLY the ſenſe; and where a doubt ariſes, it is to be conſidered what anſwer the makers of the ſtatute would have given to ſuch a queſtion. The words "void "and null" in ſtatutes have been often held only to mean voidable; ſo though the 1. *Jac.* 1. c. 17. orders that notice ſhall be given in writing, yet notice has, in ſome caſes, been held good though not in writing. Suppoſe the juſtices had appointed overſeers,

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(*a*) St. Michael Cornhill *v.* St. Michael Ipſwich, Eaſter Term, 2. *Geo.* 2. Rex *v.* Fiſher, 2. Stra. 865.

(*b*) Rex *v.* Morris,

(*c*) Rex *v.* St. Leonard, Shoreditch, 2. Salk. 483. S. C. Holt, 508. But the ſeſſions cannot make an original rate, Rex *v.* Aberford, 2. Ld. Ray. 798. See alſo, as to the power of the ſeſſions on this ſubject, Dougl. 562. Cald. 105. 1. Term Rep. 625. 2. Term Rep. 623. 3. Term Rep. 480.

(*d*) 2. Salk. 473.

(*e*) Cro. Car. 92. 394.

and they had died the laſt day of the month, could no appointment be made after? Suppoſe the juſtices make a wrong appointment, cannot a good one be made afterwards, if in the mean while the time ſhould elapſe? If not, great inconveniencies muſt follow: and therefore the *mandamus* and return ought to be allowed.

Lee, *Chief Juſtice.* This is a caſe of a good deal of conſequence, and I know of no determinations that have adjudged this ſtatute to be only directory, except in that clauſe which relates to the binding of apprentices by the juſtices, which is held to be directory in the caſe of *The King v. Morris*, cited by Mr. Hollings. The Court muſt take notice of the Calendar (*a*). There may be a difference between an officer at common law, and a new officer who is made by ſtatute; for whether this Court can conſtrue the power of ſuch new-created officer in other terms than the ſtatute has limited it, is what I am doubtful of. In the conſtruction of charters the rule is, that every affirmative clauſe implies a negative; though in *Hicks' Caſe (b)* it was held only directory; but the reaſon was, that there was impliedly an incidental power in the corporation to elect, &c. In this caſe the ſtatute orders the election to be yearly; and the intention of the ſtatute is certainly that it ſhould be ſo by impoſing a penalty. In the caſe of *The King v. Truro*, by the name of *Prowſe v. Foot (c)*, the words of the charter were "*annuatim eligent, &c.*" and the meaning was held to be, that the office ſhould be annual, and expire at the end of the year; but the contrary was held in the exchequer, and afterwards in the lords, and that it was but directory. Upon the ſtatute of the 23. *Hen.* 6. c. 15. ſ. 2. of Elections, my Lord Coke holds, that the time muſt be obſerved, and ſays (*d*), that no election can be made of any knight of the ſhire but between the hours of eight and eleven in the forenoon, but if the election is begun within that time it may be continued on after it; and therefore, conſidering what may be the conſequences ariſing upon this caſe, I think it is proper to conſider further of it. If the juſtices had not a power to appoint after the time is paſſed, to be ſure the *mandamus* will be *ſelo de ſe.*

Page, *Juſtice.* I am of opinion that this is only directory in the ſtatute; for if the officers hold over, is the ſtatute to expire and be uſeleſs, and are no new overſeers to be choſen? or ſuppoſe they die, Are overſeers never to be choſen in their ſtead, becauſe the time is expired? The act puniſhes the juſtices for exceeding the time, but does not take away their power of appointing overſeers.

Probyn, *Juſtice.* The difficulty with me is, that here is a new authority; and it is a rule, that in ſuch caſe it muſt be ſtrictly purſued. If the overſeer ſhould die, there would be a neceſſity for chuſing another, and then the Court might carry the law into execution for the neceſſity of it. It ſeems to me, that the cauſe

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(*a*) 6. Mod. 41. 81. 248.

(*b*) Roll. Abr. "Corporation."

(*c*) 3. Brown's Caſes in Parl. 167.

(*d*) 4. Inſt. 48.

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ought to be purſued ſtrictly according to the ſtatute that created it; and the penalty ſhews that to be the intention of the Legiſlature. The Court has held the clauſe in the ſtatute for the binding of apprentices for ſeven years to be directory; not that it is ſtrictly according to the ſtatute, but becauſe it is the act of the party himſelf. I would conſider further of this cauſe.

CHAPPLE, *Juſtice*. An explanatory act muſt be taken literally and not by intendment; for it would be incongruous for an explanatory act to need an explanation. According to 2. *Inſt.* 71. leets ſhall be held twice a-year, but that is to be according to the accuſtomed time and place, which ſhews the ſtatute to be declarative. It is held in 2. *Salk.* 487. that extraparochial places are omitted out of this ſtatute, and perſons there muſt ſubſiſt upon private charity, as all poor did at common law before this ſtatute. The beginning of this ſtatute requires the juſtices to be of the *quorum*; and the words "ſaid juſtices" relate thereto through the whole act: if the makers of this act were to be aſked what the words "ſo to be nominated" ſhall relate to; what anſwer would be given, but that they ſhould relate to the time before mentioned in the ſtatute. But, as this caſe may be of great conſequence, I ſhall give no poſitive opinion at preſent.

LEE, *Chief Juſtice*. Let it ſtand over for further conſideration.

It was afterwards, in the ſame Term, argued as follows, by the name of *The King v. Fonnereau and Others*.

Upon arguing again the rule to ſhew cauſe why the writ of *mandamus* and return ſhould not be quaſhed, &c. the queſtion was, Whether overſeers of the poor can be appointed after the time limited by the ſtatute 43. *Eliz.* c. 2. has expired?

MR. HOLLINGS inſiſted that they might; for though I do admit that the *mandamus* cannot give a right where there is none, yet here the juſtices have a proper juriſdiction. The 8. & 9. *Will.* 3. c. 30. impowers the juſtices upon an appeal to the ſeſſions to allow coſts; and therefore a *mandamus* to allow coſts at another ſeſſions was quaſhed, in *Michaelmas Term*, in the fifth year of *George the Second*, becauſe the ſubſequent ſeſſions had no juriſdiction to give coſts, by the act. So where an appeal is given to the next ſeſſions, if the party let it lapſe he is barred (*a*). But there is a difference between not electing a mayor within the time preſcribed by the charter, as in *King v. Pool* (*b*), and where an act of parliament appoints officers to be choſen within a certain time, which would be fruſtrated if the time being elapſed would make an appointment void. The caſe in 4. *Inſt.* 48. which was to prevent the elections of members in parliament from being held at unreaſonable times, is different from

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(*a*) See Mr. Conſt's Poor Laws, 1 vol. 231. 236. 239. 247.

(*b*) 7. *Geo.* 2. Annaly, 23. 47. 2. Bar. K. B. 93 447. Cunn. 11.

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this caſe. Statutes of public conveniency are to be equitably expounded. The ſtatute 9. *Edw.* 3. c. 2. extends to adminiſtrators, though executors only are named in it; and a caſe was held to be within the equity of the ſtatute 4. *Hen.* 4. though not within the expreſs words of it (*a*). So although the ſtatute of *Glouceſter*, 6. *Edw.* 1. c. 5. give an action of waſte only againſt a tenant for life or years, it is held to extend to a tenant for but one year, &c. The ſtatute 43. *Eliz.* c. 2. was made for the benefit of the poor, who ought not to ſuffer for the juſtices neglect; and PRATT, *Chief Juſtice*, and RAYMOND, *Juſtice*, were of opinion, that upon the juſtices neglect an appointment might be made after the time, becauſe the pariſh ought not to ſuffer for their fault; and there is a neceſſity that overſeers of the poor ſhould be appointed. This queſtion is not whether the juſtices, by appointing after the time, have avoided the penalty of the ſtatute, but whether ſuch appointment is an abſolute nullity and void; if ſo, it would be in the power of the juſtices never to appoint overſeers; for who can compel them to execute their authority within the time mentioned? The Court will not grant a *mandamus* within the time, for there is then no neglect; and the Court will not preſume that they will neglect to appoint within the time. Suppoſe the quarter-ſeſſions after the time ſhould quaſh an appointment, as they may, and order a new one, could not a new appointment be made? And if they could obey ſuch an order, why not obey a *mandamus* of this Court? The ſtatute 2. *Hen.* 5. c. 4. and other ſtatutes direct the quarter-ſeſſions to be held at ſuch certain times, &c. and yet according to 2. *Hale's H. Pl. Cr.* 49, 50. the quarter-ſeſſions are held at various times, &c. the ſtatute being only directory and in the affirmative. Wherefore the rule ought to be diſcharged.

SIR THOMAS ABNEY *contra.* The caſe cited from *Sir Matthew Hale* cannot be law, for ſince that there have been many hundreds of caſes where the orders of ſeſſions not being held *intra menſem*, have been quaſhed.

LEE, *Chief Juſtice.* There have been the ſayings of LORD PRATT and LORD RAYMOND upon the ſubject, but no judgments. I have no objection, if you deſire it, to let the queſtion ſtand for further argument.

Afterwards in *Hilary Term* 1739, in the thirteenth of *George the Second*, IT WAS RESOLVED BY THE WHOLE COURT that the appointment was good.

(*a*) Plowd. 467.

The King *againſt* Crofts.

Caſe 331.

THE DEFENDANT was convicted by the name and addition of *Mary Crofts*, dealer in ſpirituous liquors, and wife of *John Crofts*, victualler, &c. for that ſhe of her own voluntary act ſold gin, contrary to the ſtatute 9. *Geo.* 2. c. 23. *&c.*

A *feme covert* may be convicted on the 9. *Geo.* 2. c. 23. for ſelling gin, without making her huſband a party.—S. C. 2. Stra. 1120.

THE KING *againſt* CROFTS.

BOOTLE, *Serjeant*, took an exception, that the defendant's huſband was no party to the conviction, as he ought to have been; for it ſhall be preſumed that ſhe ſold the gin for the benefit of the huſband; and the puniſhment being pecuniary and not corporal, ſhe cannot comply with the penalty deſigned by the act. If a wife do an illegal act in ſelling anything, it is for her huſband's benefit, and therefore he muſt be made a party to the indictment (*a*).

MR. SOLICITOR GENERAL *contra*. There have been a great number of *femes coverts* convicted upon this act, and upon non-payment of the penalty have undergone the diſcipline of a houſe of correction. The law indulges a woman only where ſhe commits an offence or theft in company with her huſband, but not where ſhe does it by his command, unleſs he is actually in her company. This has been held in a great number of caſes (*b*). It is ſaid, that where a wife can offend alone, the huſband ſhall not be included; and the defendant's being called "the wife of *John Crofts*, victualler," does not imply her huſband's coercion. She was ſummoned, &c. and the Court will not intend that ſhe was convicted by the juſtices without being admitted to make a full defence. The words of the conviction are, that ſhe did it voluntarily, which excludes the preſumption of the huſband's coercion. In the caſe cited by MR. BOOTLE, no judgment was given; and it is blindly and lamely reported. If the wife be indicted for a ſcold, the huſband need not be a party (*c*). A married woman may be indicted alone for a forcible entry. If the wife ſell gin and the huſband will not pay the penalty, muſt he go to *Bridewell* for his wife? So that in this caſe there is a corporal as well as a pecuniary puniſhment.

LEE, *Chief Juſtice*. There is no doubt but that the words of the ſtatute are ſufficient to include the defendant; for the words are very general. The defendant muſt be conſidered as a perſon who had ſold ſpirituous liquors. The objection is, that the defendant being a married woman, the huſband ought to be joined. I do not know of any caſe where there is a proſecution againſt a *feme covert* for a crime upon the breach of an act, for which there is a pecuniary penalty inflicted, and for default of payment corporal puniſhment, that the huſband is liable. Suppoſe ſhe was compelled by her huſband, it is his act, and he is liable to the penalty of the ſtatute, and that would have been the wife's defence before the juſtice. There are ſeveral caſes like this upon the ſtatute 1. *Eliz.* that ſubjects a perſon to a penalty for not going to church, whereupon a wife may be proceeded againſt alone; *Forſter's Caſe* (*d*), *Dr. Huſſey's Caſe* (*e*).

(*a*) Keb. 634. King *v.* Jordan, 1. Sid. 410. King *v.* Venner, 2. Keb. 468. 479.

(*b*) LORD COKE, 3. Inſt. and in Hale's H. Pl. Cr. ſmall edition, 65. and tranſcribed into Hawk. Pl. Cr. vol. 1. p. 3.

(*c*) 6. Mod. 213. 239. Hawk. Pl. Cr. vol. 1. p. 147.

(*d*) 11. Co. 56. 2. Bulſt. 324. 1. Roll. Rep. 81.

(*e*) Hob. 96.

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Though it is ſaid that a *feme covert* cannot pay damages, and *Lex non cogit ad impoſſibilia*, and *Impotentia excuſat legem*, yet as ſhe is as capable of forbearing the crime forbidden as a man, thoſe maxims do not extend to this caſe, according to the reaſoning in *Huſſey's Caſe*. The caſes in *Siderfin* and *Keble* are no determinations at all, and the authorities in *Coke* and *Hobart* govern this caſe. If the huſband be no party to the crime, it would be an odd conſtruction to make him a party to the conviction.

PAGE, *Juſtice*. A *feme covert* was indicted alone for keeping a diſorderly houſe in *Eſſex-ſtreet*; and though it was objected that the huſband ought to be a party, becauſe of his power over her, yet as it did not appear to be by her huſband's coercion, it was held in the caſe of *The King v. Dixon (a)*, in LORD HOLT's time, that ſhe was indictable alone. And as this conviction is ſaid to be upon the wife's voluntary act of ſelling the gin, it can never be intended to have been by the command of the huſband.

PROBYN, *Juſtice*, *abſente propter ægritudinem*.

CHAPPLE, *Juſtice*. The caſe of *The King v. Jordan (b)* is unſupported by any authority of the like nature, and ſeems to be upon a compromiſe; for the judgment was ſtayed, and no judgment given in that matter. In the caſe of *The King v. Venner (c)* the wife was named "*Spinſter, alias Diet*," and no judgment that the wife was not liable, but that ſhe might not be guilty of converting. So that neither of theſe caſes are of authority to lead the Court in this queſtion. The queſtion ſeems to be, Whether the offence be of ſuch a nature as a married woman may be guilty of? Though the advantage of a contract is the huſband's, yet it was the intent of the act to prevent the ſelling of ſpirituous liquors in private places, to the detriment of the revenue, and the increaſe of immorality. The wife may be indicted for keeping a bawdy-houſe (*d*). It does not appear but that ſhe might not be a married woman at the time of ſelling the gin, but only at the time of the conviction; for her character as a wife is appended only by way of addition. The penalty cannot be recovered againſt the huſband by making him party; but the wife in this caſe may ſuffer the corporal puniſhment without making the huſband a party; though upon the wife's recuſancy, the huſband's lands in her right are liable (*e*). The utility of the ſtatute would be loſt, if married women might by this means eſcape the penalty of it.

PAGE, *Juſtice*. According to *Sir Edward Coke*, a married woman may be impriſoned for not taking the oath (*f*).

(*a*) 10. Mod. 339.

(*b*) 2. Keb. 634. 2. Leon. 34.

(*c*) Sid. 410.

(*d*) 1. Salk. 384. 1. Hawk. P. C. ch. 1. ſ.

(*e*) Cro. Jac. 482.

(*f*) See alſo Rex *v.* Ellen Taylor, Eaſter Term, 5. *Geo.* 3. where a married woman was committed to the houſe of correction for not performing an order for the maintenance of a baſtard-child had before marriage, and held good. 3. Burr. 1679.

Caſe 332.

The King *againſt* Jenour.

An information granted againſt the defendant for a libel againſt the *Eaſt India Company*, although the imputation was in the ſingular number, *viz.* "Whereas "an *Eaſt India* "director has "raiſed, &c."

S. C. 2. Barnes, 183.

Mr. Solicitor General and Mr. Brown moved for an information againſt the defendant for printing and publiſhing a libel againſt the East India Company, in an advertiſement in a paper called *The Daily Advertiſer*, dated *October* the eighth, 1739, No. 2717, in the words following: "Whereas an *Eaſt* "*India* Director has raiſed the price of green-tea to an extravagant "rate, the ſame gentleman being alſo concerned with the *Swediſh* "*Eaſt India Company*, the *Engliſh* proprietors hope he will find "ſome meaſure to raiſe bohea-tea in *Sweden*, that the Company "may have an opportunity to ſhip off ſome of their bad bohea-"tea, inſtead of having it burnt as uſual." And upon a rule to ſhew cauſe why an information ſhould not go againſt the defendant for printing and publiſhing a libel againſt the Directors of the *Eaſt India Company*;

Mr. Hollings *for the defendant* inſiſted, that an information ought not to be granted in this caſe. The rule calls this "a "libel againſt the *Eaſt India Company*," and I believe none but a Company would have made ſuch an application as this. The libel is only againſt one *Eaſt India* Director; is that a libel againſt all the Directors? One Director can never be ſaid to include the whole, though the whole includes all the parts. Every particular Director may as well move for an information as the Company; and ſo twenty-four informations may as well be moved for as one. The act of parliament which reſtrains this Company from being concerned with foreign *Eaſt India Companies*, and obliges the Directors to take an oath accordingly, will not affect this queſtion; for by charging one man with perjury, &c. fourteen, or any other number, can never be charged. Suppoſe a perſon was to ſay, "a certain Counſellor has been guilty of felony," could the whole Bar move for an information? A paper called "*The Flying* "*Poſt*" had an article concerning "a notable lawyer," and the word "*not*" was printed in italicks; Serjeant Nott took it upon himſelf, and accordingly an information was granted upon his motion, but not at the inſtance of the Bar. And he concluded that this rule ought to be diſcharged, with coſts.

Mr. Attorney General, Mr. Solicitor General, Mr. Brown, Philmer, and Dennison *contra*. As this libel is meant againſt one Director, it is no defence to ſay that it is not a ſlander againſt all. The defendant ought to point out who that falſe brother is. The public, in the mean while, apply this libel againſt the Company. It is not like ſaying "a certain Counſellor, &c." for this is a ſelect Company. It is a charge of an offence which the laws have made very penal; and it would be very inconvenient, if where there are a few perſons incorporated, a libel may be made againſt any one at random, which is a libel againſt all; for the public will fix it upon the one or the other according to their conjectures, The King *againſt* Jenour.

which makes it a libel againſtall the Directors, as it caſts a ſlander upon the whole Company. It is like the caſe where a perſon throws a ſtone over a wall, &c. which does miſchief, whether he intended it againſt the perſon whom he hurts or no. The defendant afterwards brings the Company into his advertiſement, and couples them with the ſlander; and it is the whole body that is libelled under the deſcription of "a certain Director." Slanderous matter is always ſufficient to ground an information for a libel. A writing was fixed up in a church, deſiring *A. B. C.* and *D.* truſtees in the truſt for, &c. to reform ſome abuſes in the truſt; and an information was granted for it (*a*), on behalf of all the truſtees; and the Court ſaid, that if any of them ſhould move for another information for the ſame offence, judgment might be pleaded in bar; and therefore the defendant is in no danger of having a multiplicity of informations againſt him; and if the plaintiffs were intitled to twenty-four informations, he is the more obliged to their candour in being contented to have but one information. And when the defendant's Counſel admit this matter to be libellous, it is a very extraordinary concluſion in them to pray coſts: but it is to be hoped that an information ſhall be granted againſt him.

Lee, *Chief Juſtice.* It is not inſiſted that the matter of the advertiſement does not import what is libellous: it charges ſomebody with being concerned in the *Swediſh Eaſt India Company*; which is certainly a reflection upon the perſon who is ſaid to have acted ſo. The rule is for the defendant to ſhew cauſe why an information ſhould not be filed againſt him for a libel upon the Directors of the *Eaſt India Company*; and it is objected to, as not being a libel againſt all of them; but the advertiſement ſeems equally applicable to every one of the Directors. Where a paper is printed, equally reflecting upon a certain number of people, it reflects upon all; and readers according to their different opinions may apply it ſo. It has been the rule of this Court always to endeavour to prevent libels upon ſocieties of men. Where the perſons reflected upon are quite unknown, the Court will not grant an information. In the *Jews' Caſe* (*b*) it appeared by affidavit, that the perſons upon whom the reflection was made were moved; but the Court held, that for the printing ſuch an account of the *Jews* as would tend to make people believe them ſo barbarous as to burn a woman and her child, becauſe it was begot by a Chriſtian, the information ought to go. Now as this is equally applicable to all the Directors, the readers may equally apply it to any one, which is the inconveniency this Court always endeavours to prevent. If a man ſay, "*A, B. C*, and twenty more, "(naming them) are ſome of them guilty of publiſhing a libel," I think an information would lie for it. And as this, upon the face of it, amounts to a libel, I think the Court ought to grant an information.

(*a*) Rex *v.* Griffin, Hilary Term, 7. *Geo.* 2. 1. Seſſ. Caſes, 257. Caſe 206.

(*b*) Rex *v.* Oſbourne, Trinity Term 5. *Geo.* 2. 2. Bar. K. B. 138. 166.

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Page, *Juſtice*, was of the ſame opinion.

Probyn, *Juſtice*. By the common rules of conſtruction it is a libel upon the whole Company, for by the figure *metonymy* the part ſtands for the whole; and it matters not what the writer meant, but what the reader will think of it; and it may by different perſons be applied to every member of the Company. When a perſon ſays, a member of a Company, a Director, &c. has committed an offence, it is a reflection upon the whole body; for it will be hardly underſtood that one member alone could raiſe the price of green-tea; and he afterwards names the Company. I think this deſerves the animadverſion of the Court. The advertiſer ought to know the author of this, and to produce him.

Chapple, *Juſtice*. It is not neceſſary to give any opinion how the information muſt be drawn, or whether it muſt be a libel againſt all the Directors. It ſeems to be a reflection upon all the Directors, and the concluſion of it ſeems to throw a general reflection upon the Company. As it points out none in particular, it muſt reflect upon all, and create a diſtruſt of them in the public: and therefore I think the rule ought to be made abſolute, and it will be for the jury's conſideration whether this reflects upon all the Company.

Lee, *Chief Juſtice*. The rule muſt be made abſolute.

The defendant being found "guilty" upon this information, was adjudged in *Eaſter Term* 1741, to pay a fine of twenty marks.

Caſe 333. The King *againſt* Harman and Others.

An order of juſtices appointing five overſeers for the ſame place, is bad.

S. C. 2. Seſſ. Caſ. 201, 202. S. C. 1. Conſt, page 17. pl. 9.

UPON the return of *a certiorari* (*a*) it appeared, that the juſtices had appointed the defendants *Harman*, *&c.* in all five in number, to be overſeers of the poor of the pariſh of *Saint Clement Danes*; that a rate-book, not ſaying what rate-book, had been tendered, not ſaying by whom, to the defendant *Harman's* maid-ſervant, who refuſed to accept it, and threatened to throw it out of doors; that a poor's-rate was tendered to the defendant *Harman* himſelf, not ſaying by whom, but that he refuſed it, and neglected to execute the office and attend the juſtices at ſeveral meetings therein ſpecified: wherefore they adjudged him guilty of neglecting his duty, and fined him twenty ſhillings for each neglect, and ordered his goods to be diſtrained for payment of the ſame.

The queſtion was, Whether this is a good appointment of overſeers, within the ſtatute 43. *Eliz.* c. 2.; and whether the order to diſtrain is regular?

Sir Thomas Abney *for the plaintiff* argued, that at common law, according to the learned *Doctor Prideaux* (*b*), the poor were

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(*a*) Ante, 287.

(*b*) Prideaux's Duty of Churchwardens.

maintained

The King *againſt* Harman and Others.

maintained by the clergy and poors-box in the churches, ſome of which are yet remaining. The 39. *Eliz.* c. 3. which is the firſt ſtatute that mentions overſeers, and the ground of the ſtatute 43. *Eliz.* upon which this appointment was made, ſays, "that two or more "of the juſtices, one *quorum*, ſhall have power to appoint four, "three, or two ſubſtantial houſholders of the pariſh to be overſeers of the poor, having reſpect to the proportion and greatneſs "of the ſame pariſh or pariſhes;" which words give the juſtices a diſcretionary power to nominate a greater number of overſeers to take care of the poor, if the greatneſs of the pariſh require it. And the queſtion is, Whether five overſeers can be appointed within the ſtatute? The 13. & 14. *Car.* 2. c. 2. ſ. 21. appoints "two "or more overſeers in *Northumberland*, *&c.* counties therein "mentioned," and yet thoſe counties were adjudged to be mentioned only for example; and it was held that the act extends to all *England* (*a*). Pariſhes containing ſeveral vills may have more overſeers (*b*); and this pariſh of *Saint Clement Danes* has diſtinct vills, that is wards, and diſtinct juriſdictions to ſeveral purpoſes. Though a conviction is good or ill as to the whole, yet an order may be good for part and void for part. In the caſe of *The King* v. *St. James Clerkenwell* (*c*), the juſtices had appointed four overſeers of the poor; the appointment mentioned that two of them were "ſubſtantial houſholders and inhabitants of the "pariſh of *St. James Clerkenwell*," the other two were only ſaid to be "ſubſtantial houſholders;" and the order was affirmed as to the firſt two and quaſhed as to the two others, though it was moved to quaſh the whole. This appointment names five overſeers, *A. B. C. D. E.* the defendant *Harman* is firſt named, and therefore it is good as to him; and if void, is ſo only as to him who is laſt appointed.

As to the order for diſtraining the defendant's goods, that is but the juſtices proceſs, and ought not to have been returned at all, for the Court never takes notice of ſuch proceſs.

MR. SOLICITOR GENERAL *for the plaintiff.* The ſtatute of 5. *Eliz.* concerning wages, gives the juſtices no expreſs power to order the payment of huſbandry wages, and yet the Court allows them to make orders upon it for payment, only becauſe it is the uſage, and becauſe no application was made here till it became a uſage (*d*). The ſtatute gives the juſtices no original juriſdiction to diſcharge apprentices, and yet the Court allows their uſage in exerciſing it (*e*). In the caſe of *Modena* v. *Norris* (*f*), before the commiſſioners of privy council, it was held by LORD MACCLESFIELD, &c. that the commiſſion was good by uſage, though ſeemingly contrary to the ſtatute of *Queen Anne*; and the late MASTER OF THE ROLLS (*g*) was the only one who doubted it,

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(*a*) Stokeland *v.* Brockland Lodge, Sett & Rem. 43. 1. Conſt, 68.

(*b*) Rex *v.* Welbeck, 1. Conſt, 24.

(*c*) Eaſter Term, 13. *Geo.* 1. Foley, 4.

(*d*) See 1. Stra. 8. 2. Stra. 1002.

(*e*) 1. Conſt, 504.

(*f*)

(*g*) Sir Joſeph Jekyll.

and refuſed to ſit under the commiſſion. In the *Borough of Bewdley's Caſe (a)* the Court would not overturn a uſage of ſeven years, though directly contrary to the ſtatute of *Queen Anne* in awarding *a venire*, and ſo was the opinion of all the twelve Judges. If this appointment is ill, the appointments ever ſince the year 1702 are ſo, and then all the pariſhioners who have paid to ſuch overſeers may bring actions againſt them. The pariſh of *Saint Martin's* has, for ſeveral years laſt, always had a greater number than four overſeers; *St. Giles's* pariſh has ſeveral times had ten overſeers, and this preſent year it has eight; *St. Andrew's Holborn* has had more than ſix overſeers from the year 1690 to the year 1732, and from that time to this year it has had ſix; *Stepney* has had above four overſeers for a great number of years. The quaſhing this appointment might therefore produce ten thouſand actions, which all the heads at the Bar clubbed together could not defend a man againſt; and all theſe overſeers are liable to the actions of the pariſhioners for money had and received to their uſe. Could it be the intent of the Legiſlature, in paſſing the ſtatute 13. & 14. *Car.* 2. that vills ſhould have two or more overſeers, and the greateſt pariſh in *London* ſhould have no more than four? Wherefore he concluded that the appointment is good.

Mr. Hollings *for the defendants.* Uſage, according to the opinion of Lord Vaughan, expounds only doubtful acts, not plain and obvious ſtatutes. This pariſh has ſo many overſeers only to have ſo many fines, and not for lawful convenience. The inſtances of uſage are about the year 1702, but if that were to prevail, it ought to be the uſage about the time of making the ſtatute of *Elizabeth*; as ſuch contemporary uſage is the beſt expoſitor. If ten thouſand actions may be brought for ſuch appointments, it is a ſign of ten thouſand oppreſſions having been committed by the juſtices. The ſtatute of *Elizabeth* ſays, "that the churchwardens of every pariſh, and four, "three, or two ſubſtantial houſholders ſhall be overſeers of the poor;" can the words "four, three, or two" give a power to appoint an indefinite number? eſpecially as it begins with the greater number and goes downward, which is an argument that they are not to exceed four. "Overſeers" are always mentioned in the plural number, ſo that they cannot appoint one (b), which ſhews the meaning of the Legiſlature; for when the act ſpeaks of the juſtices, it ſays "two or more, &c." but when it ſpeaks of the overſeers, it ſays "four, three, or two;" and the varying the expreſſion in the common clauſe ſhews a different intention in the Legiſlature. The ſtatute 21. *Hen.* 8. c. 13. ſays, "that a duke may have ſix "chaplains, &c." Can a greater number be retained within that ſtatute? Certainly there cannot; and yet there are no negative words in that act any more than in the ſtatute of *Elizabeth*. If a ſtatute ſhould appoint proof to be made by four, three, or two witneſſes, could a greater number of witneſſes be required? This is but one appointment, and the laſt man is as much appointed thereby as he who is firſt named, for it is not five different appointments. As to bringing actions againſt the officers, they may juſtify under the juſtices warrant, though it was illegal in the juſtices to grant it.

(a) 1. Peer. Wms. 207. 2. Ld. Ray. 1359.

(b) But ſee Rex v. Morris, 4. Term Rep. 550. and Rex v. Beſland, 1. Conſt.'s P. L. 15.

The defendant ought to have been indicted for refuſing to accept the office, and not fined, after ſeveral meetings, for not coming to them; for no man can be ſaid to be negligent in an office which he never accepted of; and they ought to have proceeded againſt him by indictment, as a conſtable muſt be indicted for refuſing to take the office when he is choſen into it. *The King* v. *Pope*, 5. *Mod.* 419.

HAYWARD, *Serjeant, for the defendant.* This firſt point is, Whether the act of parliament warrants this appointment? ſecondly, Whether the proceedings of the juſtices are legal?

FIRST, To what purpoſe ſhould the Legiſlature have appointed the number of overſeers in a retrograde manner, "four, three, or "two," if a greater number could be made in an unlimited manner? In the caſe of *The King* v. *Clerkenwell* there were but four overſeers appointed, ſo that the act was not exceeded. Juſtices may certainly appoint payment of huſbandry wages, for it is the intention of the ſtatute that they ſhould do ſo; but they cannot make an order for the payment of coachmen's or valet's wages, or the like. *Modena's Caſe* was not judicially determined; and it was not for nothing that ſo great a man as the late MASTER OF THE ROLLS diſſented from it, and refuſed to ſit under that commiſſion; and it was but the commiſſioners own private judgment, which is not authority at all in law. And as to the number of actions that may ariſe from quaſhing this appointment, I believe it has been adjudged, that where a man has paid money to an officer acting under ſuch a warrant, he cannot afterwards bring an action againſt him for money had and received to his uſe. They ſay, that this order ought not to have been returned, when they themſelves are the perſons who returned it.

SECONDLY, The juſtices proceeding is unwarranted by law. The proper method is by indictment (*a*); they might have applied for a *mandamus* to compel the defendant to execute the office of overſeer: at this rate any man, your lordſhip, or myſelf, may be appointed an overſeer without any opportunity of avoiding a diſtreſs. The ſtatute appoints three meetings of the juſtices to be once a month, on a *Sunday*, after church; here they have met three times a month, and upon other days, and for the defendant's not attending have fined him. They may as well meet every day, and ſo have fined the defendant three hundred and ſixty-five pounds a-year.

LEE, *Chief Juſtice.* There are two conſiderations in this caſe: the one is the order of appointment; the ſecond is the order of

diſtreſs;

(*a*) See Rex v. Jones, poſt. 410.

diſtreſs; and if that is to be conſidered merely as a warrant of diſtreſs, it ought not to be removed here, and the Court cannot make any judgment upon it. But it ſeems here that it muſt be conſidered as an adjudication, as much as if it were an order of removal; for it ſays, that *Harman* is adjudged to have neglected his duty, &c. ſo that it is an adjudication upon the face of it, like the caſe of an order of ſettlement, which is conſidered as an adjudication. The exceptions to it ſeem very ſtrong, particularly in that inſtance of his ſervant's refuſal of the rate-book, and his refuſal of a rate, without ſaying who tendered them, whether a pariſhioner or not.

As to the other part of the caſe, which relates to the appointment, I am very doubtful whether it comes in ſuch a way as the Court ſhould quaſh the appointment; for if but four overſeers are to be appointed and five are appointed, I cannot ſee but it will be void in the whole. The ſtatute 21. *Hen.* 8. c. 13. appoints a certain number of chaplains; and where a perſon at one and the ſame time appointed more, it was held not to be void *in toto*, but that the three firſt promoted were well appointed, and that it was only void as to the other, *Drury's Caſe (a)*; but here, where we are confined to the words of the order, which is an appointment of five, we cannot determine which of them we are to ſtrike out. I do not think this caſe is like the *Caſe of Clerkenwell*, for there the Court had a plain and diſtinct return to determine upon, and full direction from the ſtatute. This appointment is *uno flatu*, and we can make no difference between the firſt and the laſt named in this appointment. An appointment "for the year enſuing" has been held well enough in ſeveral caſes (*b*).

Page, *Juſtice.* I think that both the objections are well taken; that the order is a void order; and that it ought to be quaſhed for the whole, for I think it is void for the whole: where a ſtatute gives a new power or creates a new authority, it implies a negative that it ſhall not be exceeded.

Lee, *Chief Juſtice.* I do not lay any ſtreſs upon the uſage that has been mentioned of pariſhes, for that cannot controul the law: I take the juriſdiction of the juſtices about wages, to ariſe from the liberal conſtruction which this Court has made upon the ſtatute, and not from their uſage of ſuch a power. In the caſe of an apprentice, the Court of late has allowed an application to the ſeſſions, originally upon the conſtruction of the act, though there is a caſe otherwiſe in *Sanders*; but the late caſe allowed it upon the conſtruction of the act. In *Drury's Caſe* the queſtion was, Whether the retainer was not abſolutely void? and *Jenk.* 272. holds that it is void as to all; but afterwards in 4. *Co.* 89. it was held not to be abſolutely void for the whole.

Probyn, *Juſtice.* There is no neceſſity for the Court to give an opinion upon the appointment, for it may come before the

Court

(*a*) 4. Co. 89. S. C. Jenk. 272. S. C. Cro. Eliz 723. 839. S. C. Moor, 561. S. C. Hughes Entries, 22.

(*b*) See Rex v. Sparrow, ante, 393. S. C. 2. Stra. 1123. Rex v. Searl, Foley, 11. Rex v. Helling, 2. Burr. 1005. Rex v. Stubbs, 2. Term Rep. 395.

Court in a regular way. If this order was like a proceſs, and not an adjudication of the juſtices, the Court would not take notice of it; but the juſtices adjudge the party to be guilty of an offence, and in the ſame inſtrument they order a diſtreſs, which is like an order of ſettlement. But as the offences therein ſet forth are of a diſtinct nature, there ought to have been ſeveral judgments. It does not appear that the party had ſufficient notice that he was appointed overſeer; and therefore I concur with MY LORD and Brother that this is *an order*, and that it ought to be quaſhed.

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As to the other point, where a new authority is created, it is hard to ſay that the juſtices ſhall exceed the number appointed by it; and, as my BROTHER PAGE ſays, the new authority implies ſuch a negative. The uſage that ſhall vary an act of parliament muſt not be the uſage of a particular place or pariſh, but univerſal through the kingdom; and that was the *Caſe of Bewdley*. Uſages antient and immemorial obtain the ſanction of a law, but the uſages here cited are both particular, and have ariſen of late years. In the *Caſe of Clerkenwell* there was a diſtinction in the return; two were well deſcribed and two not. Here the Court cannot ſay which overſeer is appointed well, and which not.

CHAPPLE, *Juſtice*. I think it more reaſonable to reſtrain the juſtices to the number appointed in the act than to permit them to exceed it; for if they may appoint eighteen, as it has been ſaid they have done in ſome pariſhes, they may as well appoint half the pariſh; and a particular uſage ought not to deſtroy an expreſs act of parliament. And in the *Caſe of Brecknock* I think it was held, that a uſage contrary to a charter was not good. I think the adjudication of the penalty and diſtreſs is a void adjudication in every part. The rate-book was tendered to the maid, and ſhe might refuſe it, for it does not appear to have been tendered by a pariſhioner, or what rate-book it was.

LEE, *Chief Juſtice*. Let the rule for quaſhing the order be made abſolute; and let the other ſtand for further conſideration.

Smith *againſt* Huggins, Orlebar, and Others. Caſe 334.

UPON A MOTION for a new trial it appeared, that this was an action brought by the plaintiff for two thouſand pounds, for oil ſold and delivered by him for the *Conic Lamps*, upon the credit of the defendants as partners therein. They pleaded the general iſſue; and now, after a verdict for the plaintiff,

LEE, *Chief Juſtice*, reported, that the evidence to charge the defendants was that of one *Fox*, who produced a paper account of oil ſold between the years 1733 and 1736, and ſaid that the manner of dealing was by giving a note promiſing to pay for the oil delivered at the Lamp Office, which was in the firſt perſon, and delivered by the officer, and amounted to the value of two thouſand three hundred

If ſeveral perſons act as partners, and contract debts, and an action is brought againſt ſeveral perſons, as thoſe compoſing the whole *firm*, the Court will not grant them a new trial on a ſuggeſtion that all the concerned were not named, or that ſome were named who were not concerned.—S. C. 2. Stra. 1142.

Smith *againſt* Huggins, Orlebar, and Others.

and two pounds eight ſhillings and tenpence. Further evidence againſt the defendant *Huggins* was a letter of his to *Mr. Rayner*, an attorney, in the year 1737, which was to this effect: "Sir, "*Mr. Orlebar* being come to town upon *Mr. Parker*'s ſuit de"ſires to meet *Mr. Smith* at the *Lamp Office* to conſider how to "proceed; and I will endeavour to meet him there, &c." And it likewiſe appeared, that *Huggins* had accepted of a transfer in their ſtock. The evidence againſt the defendant *Orlebar* was likewiſe, that a ſhare in the Company's ſtock had been transferred to his father in the year 1708; that he was adminiſtrator to his father, and had received dividends; that he was reputed to be a proprietor; and had been ſeen at the office. And THE CHIEF JUSTICE concluded, that upon the whole he could not certify that this was a verdict againſt evidence.

SIR THOMAS ABNEY and MR. HOLLINGS moved to ſet aſide this verdict: FIRST, In point of evidence; and, SECONDLY, in point of law. FIRST, *Huggins* and *Orlebar* never concerned themſelves in the direction or management of this affair. As this action was brought againſt the defendants in a corporate capacity, it ought to have appeared that they acted as partners, and were the only partners, though there were expreſs evidence of other partners. SECONDLY, The patent which *Queen Anne* granted to the proprietors of the *Conic Lamps* for fourteen years expired before the fixth year of *George the Firſt*; and if not, yet it would have been repealed by the ſtatute of 6. *Geo.* 1. c. 18. commonly called the *Bubble Act*; and the proprietors cannot now be more liable, for the *Bubble Act* is a bar to the action, either upon the ſtatute patent or without; and if ſo, the defendants in this caſe have as much right to reſort to it as they would in caſes of gaming, uſury, &c. Wherefore the verdict ought to be ſet aſide, and a new trial granted.

MR. SOLICITOR GENERAL *for the plaintiff.* There is a proviſo in the *Bubble Act* that it ſhall not extend to any things, &c. done before the twenty-fourth of *June* 1718. Though the defendants were not in actual partnerſhip, yet if they are reputed partners, it is no defence to ſay that they are not really ſo: as if a tradeſman bring an action againſt a man for goods ſold to his reputed wife, it is no defence to ſay that they are not really married, cohabitation is ſufficient. So this being a lawful debt, the defendants acting together in this matter is ſufficient to charge them, the oil being ſold upon their credit. If there be any doubt in the Court, they will not grant a new trial in an hard action, or againſt the honeſty of a cauſe (a). In the caſe of *Deerly v. Ducheſs of Mazarine* (b), a new trial was denied, though the defendant proved coverture, becauſe it would avoid the payment of a juſt debt. The granting of new trials is diſcretionary, and not *ex debito juſtitiæ*; and they ought not to ſet aſide this verdict without ſhewing how the action ought to be brought, as a defendant ſhall not abate the plaintiff's writ without giving him a better.

(a) Smith v. Page, Salk. 644. (b) Salk. 646.

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Mr. Floyd *for the plaintiff.* The queſtion is, Whether this is ſuch a verdict as an honeſt jury might give? for as to the weight of evidence on each ſide, that muſt be left entirely to them. The plaintiff has ſold and delivered his goods; and now the queſtion is, Whether he ſhall be paid for them? It is ſaid, that this is not a lawful partnerſhip. This is the firſt time that ever perſons tried to bring themſelves within the act of parliament. The 6. *Geo.* 1. c. 18. ſ. 19. makes ſuch undertakings void. How? Only among themſelves, but not as to others, ſo as to privilege them from paying their debts, for in ſect. 20. there is a proviſion for creditors.

Selwin *for the plaintiff.* A general reputation of partnerſhip is ſufficient, unleſs the defendants make the contrary appear by refuſal or diſclaimer, &c. In motions for new trials, the Court often takes the equity of the caſe into their conſideration. In the year 1733 the plaintiff was paid off, and the undertaking carried on continually ſince.

Lee, *Chief Juſtice.* At the trial this act of parliament was not conſidered; and it has an expreſs proviſo that it ſhall not extend to any undertakings before the year 1718. Then it is to be conſidered, Whether this is a void undertaking as to creditors. And I think the action maintainable upon the conſideration, if there was ſufficient evidence to charge the defendants as partners at the time of delivering the goods. And I cannot call this a verdict contrary to evidence.

Page, *Juſtice.* A new trial ought not to be granted.

Probyn, *Juſtice.* The only queſtion is, Whether there was proper evidence that the defendants were not partners in this undertaking, or that there were any others? If there had, no doubt but my Lord would have ordered the plaintiff to be nonſuited. The evidence as to *Mr. Orlebar*, the adminiſtrator, was certainly doubtful; but it does not appear he did any act to accept of the ſhare, or the like. He was ſeen indeed at the office; which is but weak evidence; but certainly it is ſome evidence, and ſo a matter proper to be left to the jury, who are to judge of it; and as they have, we are precluded. As to the matter of law, I do entirely agree with my Lord Chief Justice and my Brother; for if the partnerſhip was not lawful, yet as they acted together they ſhall be liable as partners to creditors.

Chapple, *Juſtice.* As this was an action upon a contract, to be ſure all parties to the contract ought to be joined; of which there being ſome evidence, though weak, it muſt be left to the jury. So that the verdict is ſupported by ſome evidence, and it is not to be taken that there were other partners at the time of the action brought, as it does not appear that there were; and if there had, the defendants might have ſhewn it, but the plaintiff could not: and they who are the viſible apparent partners are the perſons to be charged.

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And one partner alone might be charged, if he made the contract alone, as a ſeparate perſon, and in his own name.

Lee, *Chief Juſtice*. The rule muſt be diſcharged.

Caſe 335. The King *againſt* Jones and Another.

If a perſon be duly elected overſeer, and refuſe to execute the office, it is an indictable offence.

UPON an indictment alledged to be found againſt the defendants at *Maidſtone*, in *Kent*, "by the jurors of the king, and for the "body of the county," ſetting forth, that three juſtices *quorum unus*, &c. did duly appoint the defendants to be overſeers of the poor for the ſpace of one year; and that they obſtinately, &c. refuſed to take the office, &c. contrary to the ſtatute, &c. The defendants demurred.

S. C. 2. Stra. 1146.
S. C. 2. Seſſ. Caſes, 153.
S. C. 1. Conſt, page 298. pl. 347.

Taylor *for the defendants* inſiſted, that this was no offence at common law, nor indictable upon the ſtatute of 43. *Eliz.* c. 2.; for though it muſt be admitted, that the refuſal of an oath of office, being duly tendered, is indictable, yet where no oath or other ceremony is required, the perſon choſen immediately becomes the very officer, and therefore cannot be puniſhable for not taking the office upon him; for it is one thing to refuſe taking an office, and another not to execute it when he is a complete officer. A conſtable may be elected at the leet, or appointed by the juſtices, but he is not a complete officer before his oath, and therefore is indictable for refuſing to take that office upon him.

Secondly, The 43. *Eliz.* which preſcribes the duty of overſeers, inflicts the penalty of twenty ſhillings upon them for every default of abſence or neglect; and a general charge in an indictment, where each particular act creates a particular offence, is not good. *The King v. Roberts* (a). This indictment is laid to be "againſt the ſtatute;" and by the ſtatute the defendant is puniſhable as an officer for each particular neglect. If the defendant be an overſeer, he is not indictable for not taking the office; if he is not an overſeer, he is not puniſhable by indictment, for the ſtatute has preſcribed a puniſhment.

See Rex v. Sparrow, ante, 393.

Thirdly, The juſtices have appointed the defendants for a year, which may exceed the month after *Eaſter* preſcribed by the ſtatute. And though it has been lately ſettled, that overſeers may be appointed after that time, for the neceſſity of the thing, yet in this caſe there were two ſubſiſting officers at the ſame time.

Fourthly, The indictment is ill, being ſaid to be found "by "the jurors *of* the king," whereas it ſhould be, "by the jurors *for* "the king, &c."

Mr. Solicitor General *contra* admitted, that before 43. *Eliz.* c. 2. there were no overſeers, ſo that this could not be an offence at common law. But yet it is a principle at common law, that where an act of parliament either prohibits or requires a public thing, the doing or omitting to do it is indictable by the rules of the common law which co-operate with the ſtatute. In *The Queen v. Darey* (a), the reaſon given why a conſtable was not indictable for refuſing the office is, becauſe he is puniſhable in the leet (b): but in *The King v. Lowe* (c) it was adjudged, that a conſtable may be indicted for refuſing, though puniſhable in the leet, and that *The Queen v. Darey* went off upon another point. To enforce obedience to the magiſtrate, an indictment lies for diſobeying orders of juſtices.

(a) Carth. 226.

SECONDLY, He admitted that a general charge in an indictment is not good, unleſs in *barratry*, and there only becauſe the defendant has *a particular account* given him of the matters wherewith he is charged (d). In *The King v. Wintringham* (e), an indictment againſt one *quia malè ſe geſſit* in his office, was held not to be good, and too general.

THIRDLY, As to the appointments, they are always "for the "year enſuing."

And, FOURTHLY, As to the indictment's being by the king's jurors, "*juratores pro domino rege ſuper ſacramentum dicunt,*" is the form of moſt of the indictments upon the file in the crown office.

LEE, *Chief Juſtice.* The exceptions to the form in the indictment are material. In *The King v. Marlow* (f), the appointment of overſeers "for the year enſuing" was held to be good, an overſeer being, by the act of parliament, an annual officer; and ſubſequent authorities have ſettled that point.

Theſe are ſaid to be the "jurors of the king, and for the body "of the county," which is well enough.

The ſtatute has appointed new officers, and annexed penalties to their neglect of duty. Now if the cauſe is confined to the inſtances of it, I ſhould think a refuſal of the office may amount to diſobedience of what muſt be eſteemed mandatory in the act of parliament, and not provided for by the clauſe of the penalties. And I do not ſee any foundation for a diſtinction between an officer who is to take an oath, as a conſtable, and ſuch an office as this appointed by parliament without any ceremony: and every man, by the principles of the common law, is indictable for diſobeying an act of parliament. This may perhaps require further conſideration as to the remedy given by the act; but at preſent that ſeems to me to relate more particularly to a perſon's neglect after he has undertaken the office.

(a)

(b) See Fletcher *v.* Ingram, 1. Salk. 175. 1. Ld. Ray. 69.

(c) Mich. Term, 5. *Geo.* 2.

(d)

(e) 1. Strange, 2.

(f) Trinity Term, 13 *Geo.* 1.

THE KING *againſt* JONES AND ANOTHER

PAGE, *Juſtice*, was of the ſame opinion with the Chief Juſtice in all the exceptions.

PROBYN, *Juſtice.* An appointment of an overſeer for a year has been held to be well within the act of parliament; ſo admitted in the caſe of *The King v. Harman*, for it is an annual office.

The caption of the indictment is well enough.

The great objection is to the appointment in general, that a puniſhment is annexed to each of the breaches of duty. But the non-acceptance of the office is a breach of the law, and a breach of an act of parliament is indictable. The ſtatute ſays, they ſhall be overſeers. He who refuſes to be overſeer breaks the law made by the act, and in my opinion is indictable. And it is not like a general charge of a breach or neglect of duty, but is a charge of a breach of an act of parliament in not accepting the office. It has been ſaid, that a man cannot be indicted for refuſing an office where there is no ceremony required to complete the office. And this is not only a breach of the order, but of the act of parliament itſelf, and does not relate to the particular offences there ſpecified, which refer only to their behaviour in the office. And my opinion reſts upon this being a breach of the act of parliament. But I ſubmit it to further conſideration.

CHAPPLE, *Juſtice.* The appointment of overſeers for a year is good.

The caption ſeems well. "Jurors of the king, and for the "body of the county, &c." is well.

If this had been an indictment for neglecting the office, it had been too general, without ſpecifying the particular breaches; but this is for abſolutely refuſing the office. In the caſe of a conſtable, the refuſal of the oath is a refuſal of the office. But a man may refuſe an office by expreſs words, by an entire neglect, or the like. This total refuſal ſeems to me to be puniſhable no other way than by indictment. If there were to be an indictment againſt an overſeer for not accounting, as by the act he ought, I ſhould think it ought to be alledged that he did accept the office.

LEE, *Chief Juſtice.* I think the indictment does lie in this caſe; and as the reſt of the Court are of the ſame opinion, there is no neceſſity to defer judgment in this caſe, unleſs it is deſired from the Bar.

THE COURT. Let there be judgment for the king, *niſi*, &c.

HILARY TERM,

The Fourteenth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt. Chief Juſtice.*
Sir Francis Page, *Knt.* } *Juſtices.*
Sir William Chapple, *Knt.* } *Juſtices.*
Martin Wright, *Eſq.* } *Juſtices.*
Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Walker *againſt* Kerney.

Caſe 336.

The affidavit of a perſon who has been convicted of *forgery* cannot be read in *ſupport of a complaint*, but may be read in *exculpation of a charge.*

UPON ſome oppreſſion and extorting of money from the defendant by ſome ſheriff's officers, a rule was made for the officers to anſwer the matter in the defendant *Kerney*'s affidavit. Upon ſhewing cauſe,

IT WAS OBJECTED, that the affidavit could not be read, becauſe the party who made it was convicted, had judgment, and ſtood in the pillory for forgery; and a record of *Kerney*'s conviction, with the judgment entered thereon, was produced in court.

LEE, *Chief Juſtice.* The queſtion is, Whether the affidavit of a perſon who has been convicted, received judgment, and ſtood in the pillory for forgery, all of which have been made out by producing before us a copy of the conviction and judgment, and by the affidavit of a gentleman to *Kerney*'s ſtanding in the pillory in the year 1728, and alſo to the identity of the perſon, can be read in ſupport of the preſent complaint. And upon the beſt conſideration of this caſe, and the footing of the determinations that have been like to this, or ſeem to me to bear a near analogy to it, I am of opinion, that this affidavit cannot be read. The caſe in 5. *Mod.* 74. (a) is certainly the ſame caſe of which there is mention made in 2. *Salk.* 461. which is this: *Davis* and *Carter* being convicted of forging a Bank bill, and having ſtood in the pillory for it, and being alſo committed to *Newgate* until they paid the fine ſet upon them, were brought up to the court of king's bench,

S. C. 2. Stra. 1148.
Co. Lit. 6.
3. Lev. 426.
2. Hale, 277.
2. Hawk. P. C. ch. 46.
2. Wilſ. 225.
Tidd's Pract. 39.
Gilb. L. E. 146.

(a) See the notes to this caſe.

Walker *againſt* **Kerney.**

and they prayed that they might be turned over to *the Marſhalſea*, becauſe the ſheriff of *London* oppreſſed them in *Newgate*; and their own affidavits were offered to prove the oppreſſion: and by the Chief Juſtice, if a man has had an infamous judgment, and has ſtood in the pillory for an offence which is contrary to the faith, credit, and truſt of mankind, as forgery is, he cannot be a witneſs in any cauſe. Hale ſays *(a)*, "if a man has ſtood on the pillory, he "cannot be a witneſs." But that is to be underſtood of an infamous judgment. But if a man be convicted of a libel, and has been in the pillory for it, yet perhaps he may be a witneſs: and the affidavits of *Davis* and *Carter* were not read. The account of this caſe in 2. *Salk*. 461. is a very looſe one, and ſuch as I cannot pay any regard to, and therefore muſt depend upon the caſe as I have read it to you out of 5. *Mod*. 74. The caſe of *Delahaut v. Nichols (b)*, I am informed, was a motion to diſcharge a man upon common bail, the only affidavit to prove the debt being that of a perſon who was convicted of forgery, &c.; and the Court diſcharged the defendant upon common bail, becauſe the affidavit of a perſon under ſuch circumſtances was no affidavit within the act of parliament; and therefore debt was ſworn to, to hold the party to ſpecial bail. 2. Stra. 871. The caſe of *The King v. Charleſworth*, in this court, in Lord Raymond's time, is reported by Mr. Lacy from the Bar to be an information againſt *Charleſworth* for forging a warrant of attorney, for which he was convicted, had judgment, and ſtood in the pillory; and that, upon a motion for an attachment againſt him for ſome contempt of the court, he offered to clear himſelf upon his own affidavit; and the Court admitted it, becauſe it was only to purge himſelf, and not to accuſe or charge a third perſon; as the Court ſaid, they might as well admit his oath now as upon interrogatories. I myſelf remember the admitting the affidavit of *Charleſworth* to be read, and that it was to clear himſelf of a thing laid to his charge; but any further I do not know; but there is all the reaſon in the world to believe, that the caſe is as Mr. Lacy has cited it to me: and there is room for that diſtinction where an affidavit of an infamous perſon ſhall be read to clear himſelf, but not to charge a third perſon; and if his affidavit were not to be admitted in caſe of an attachment, he would be condemned in the firſt inſtance. The caſe of *a quaker* I take to be ſtrong in point againſt the admiſſion of *Kerney*'s affidavit. You tell us, here is a man who has received an injury, and will not the Court hear his complaint? We anſwer, It is the courſe of the Court that no complaint can be received but upon affidavit; and if *Kerney* cannot make an affidavit, we cannot admit his complaint. This is alſo the caſe of quakers in criminal matters, who refuſe to take an oath, in which caſe we cannot relieve them. In the *Caſe of Hilton (c)*, there was an application to this Court by a quaker for a breach of the peace to have articles exhibited againſt the party upon his

ſolemn

(a) 2. Hale, 277. and ſee 4. Hawk. P. C. 436.

(b) Barnes, 78. Pract. Reg 49.

(c) Hilton v. Byron, 12. Mod. 243. S. C. 3. Salk. 133. 248.

Walker *againſt* **Kerney.**

ſolemn affirmation, which was denied by the Court; for a ſolemn affirmation does not amount to an oath in criminal matters; and without an actual oath, we cannot make a perſon find ſureties of the peace, though he has done ever ſo great a perſonal injury to a quaker. There has been ſome doubt, indeed, upon the conſtruction of the ſtatute, whether articles of the peace are of a criminal nature? But there have been many caſes where an attachment ſhall not iſſue upon a quaker's (a) affirmation. Therefore I am of opinion, that *Kerney*'s affidavit is not to be read, and that the rule is to be diſcharged.

Page, *Juſtice*, was of the ſame opinion (b).

Chapple, *Juſtice*, was abſent, and ſick at *Bath*.

Wright, *Juſtice*. It is admitted, that an infamous perſon cannot be admitted as a witneſs in civil caſes, not even in the caſe of a third perſon, becauſe of the ſuppoſed iniquity of his evidence. But it is ſaid, though he cannot be a witneſs in civil matters, yet he may be an accuſer, for it is for the public weal that offenders ſhould be proſecuted. But there is a clauſe in *Magna Charta*, c. 28. in theſe words, "*Nullus ballivus ponat aliquem ad legem* "*manifeſtam nec ad juramentum ſimplici loquelâ ſuâ, ſine teſtibus* "*fidelibus ad hoc inductis.*" Now the word "*ballivus*" includes all the officers of juſtice in this kingdom, and among the reſt this Court. What then is the meaning of the words "credible wit-"neſſes?" They muſt certainly be applied to perſons that are not ſo; and an infamous perſon can never be a credible witneſs. It is of the utmoſt conſequence that perſons who are infamous ſhould rather be reſtrained from being accuſers, than witneſſes in civil matters and affairs of property; for if they were allowed to accuſe, the lives of multitudes of people of reputation and innocence might be taken away, or at leaſt brought into danger, by perſons who have forfeited all pretenſions both to reputation and innocence.

The Court. Let the rule be diſcharged.

(a) See Rex *v.* Gardner, 2. Burr. 1117. Atcheſon *v.* Everitt, Cowp. 392.

(b) It is now ſettled, in the caſe of Pendock *v.* Mackender, 2. Wilſ. 18. that it is the infamy of the crime, and not the nature of the puniſhment, that renders the party an incompetent witneſs.—See alſo the Notes to Davis' Caſe, 5. Mod. 74.

EASTER TERM,

The Fourteenth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt. Chief Juſtice.*

Sir Francis Page, *Knt.*
Sir William Chapple, *Knt.*
Martin Wright, *Eſq.*
} *Juſtices.*

Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Barneſly *againſt* Baldwyn.

Caſe 337.

A note made payable to *A.* or order on the day of the drawer's marriage is not negotiable within the 3. & 4. *Anne*, c.

S. C. Stra. 1152.
Stra. 706.

THE DEFENDANT, in conſideration of a gold watch, promiſed to pay to the plaintiff, or order, the ſum of eleven pounds on the day of his, the defendant's, marriage. The defendant married, and the plaintiff brought his action on the caſe, and declared on the ſtatute 3. & 4. *Anne*, c. . as for a negotiable note payable on the defendant's marriage, with an averment that the defendant was married. There was a verdict for the plaintiff. And on a motion in arreſt of judgment,

THE QUESTION was, Whether the above note was negotiable within the ſtatute?

CLAYTON *for the defendant* argued, that it was not negotiable within the ſtatute, becauſe it was uncertain in its time of payment, and depended upon ſuch a contingency as the money might never be paid. He cited the caſe of *Jocelyn v. Lacere* (*a*), that a bill of exchange requiring a perſon to pay ſeven pounds out of an annuity was held not good, becauſe the fund might not anſwer it; and *Jen-*

(*a*) 2. Ld. Ray. 1362. Fort. 281.

ny v. Earl (*a*), where a bill of exchange to pay money out of a fund belonging to the governor and company of *Devonſhire Miners* was held not good; and *Pearſon v. Garrett* (*b*); and *Smith v. Boheme* (*c*), *Michaelmas Term*, in the firſt year of *George the Firſt*, that a promiſſory note to pay *J. S.* forty pounds, or to ſurrender the principal, is not a good negotiable note; and *Appleby v. Biddle* (*d*), where a promiſſory note to pay a ſum of money, if his brother did not pay it within a month after *Michaelmas*, was held to be no good negotiable note. So alſo in the caſe of *Morrice v. Lee*, *Eaſter Term*, in the eleventh year of *George the Firſt*, *Mod. Caſ. in Law and Equity*, 362.

MR. DENNISON *for the plaintiff* argued, that the act does not limit any time for the payment of notes; and though this note did originally depend upon a contingency, yet now, *certum redditum eſt*, for the time is actually come, and the money payable; and cited *Andrews v. Franklin* (*e*), which was a bill of exchange to pay a ſum of money when a certain ſhip or man of war ſhould be paid off, and held good. The like point in the caſe of *Lewis v. Ord* (*f*), *Trinity Term*, in the eighth and ninth years of *George the Second*, at the Sittings in *Middleſex*, by *Lord Chief Juſtice* HARDWICKE. And this laſt MR. DENNISON cited from a note of *Mr. Filmer's*.

LEE, *Chief Juſtice*, admitted, that by the ſtatute promiſſory notes are made of the very ſame force, have the ſame remedies, and are under the ſame conſtructions, as inland bills; and that if an inland bill of exchange, payable on the day of marriage, is not good, neither is a promiſſory note of the like form made negotiable by this ſtatute. There can be no doubt, added he, but that the plaintiff has another remedy upon a note of this ſort than by declaring upon the ſtatute; but then he muſt prove a valuable conſideration, which he need not do upon the ſtatute. The words of the act of parliament in deſcription of notes is in very general terms, "for payment of ſums of money," and goes no farther. But he was of opinion, that every promiſſory note muſt have two eſſentials to bring it within the ſtatute: the one, that it muſt be for payment of money merely; the other, that ſuch money muſt be paid at all events. The caſes cited turn all upon these two principles. The caſe of *Smith v. Boheme* was held not within the ſtatute, becauſe it was not a caſh note abſolutely, but was either to pay money or do another act, *viz.* ſurrender the principal. And the caſes of *Jocelyn v. Lacere* and *Jenney v. Earl* were not good, becauſe, being bills of exchange upon funds which might fail, they did not become payable upon all events. So the principal caſe is by no means payable at all events, being upon the day of the defendant's marriage, which is an act entirely in his own power,

whether

(*a*) 8. Mod. 265. 2. Ld. Ray. 1361. 1. Stra. 591.

(*b*) 4. Mod. 242. Skin. 398. Comb. 227.

(*c*) 8. Mod. 362. Gilb. 93. Ray. Ent. 92.

(*d*) 12. Viner Abr. 208. pl. 28.

(*e*) 1. Stra. 24.

(*f*) Cunningham on Bills of Exchange, 113.

BARNESLY *againſt* BALDWIN.

whether he will make the money payable or not. And THE CHIEF JUSTICE ſaid, he did not know how to diſtinguiſh between this caſe and that of *Appleby v. Biddle* (a), where the ſame exception was taken; as here, by SERJEANT PENGELLY; and there was a rule to ſhew cauſe; but he did not find that any thing farther was done in it; that he ordered MR. MUNDY, *Clerk of the Rules*, to ſee whether anything farther was done, who told him, there was not. As to the caſe of *Andrews v. Franklyn* (b), I do not find there was any judgment in that; and the caſe of *Ord v. Lewis* was upon the ſame point. But he owned he was of a different opinion to the determinations of both thoſe caſes.

PAGE, CHAPPLE, and WRIGHT, *Juſtices*, were of the ſame opinion, that the principal note was not within the ſtatute, for that nobody would give credit to or accept ſuch note for a caſh note, and that it was not in its very nature negotiable, for that very reaſon.

But WRIGHT, *Juſtice*, differed a little from THE CHIEF JUSTICE as to the eſſentials to a note within the ſtatute, and that there were ſome events that would not make a note bad within the ſtatute; as a note payable when a ſhip ſhall be paid off is good; for ſuch event is certain enough; it is a public thing, and depends upon credit: and he ſaid, that my *Lord Chief Juſtice* PARKER cited the ſame caſe, and admitted the ſame thing, in the caſe of *Appleby v. Biddle*.

LEE, *Chief Juſtice*, inclined to be of the ſame opinion; and ſaid, he ſhould be glad to know whether the caſe of *Andrews v. Franklyn* was ever determined; that he now thought the paying off of ſhips was punctual, and very certain, but that he did not know whether to pay money at the return of a ſhip would be good or not.

THE COURT, however, did not give this as their final opinion. But on the laſt day of the Term the Court affirmed their former ſentiments. And

LEE, *Chief Juſtice*, expreſſed himſelf again to this effect, that the judgment ſhould be arreſted, becauſe it is not a note within the ſtatute, for that the ſtatute, as appears by its preamble, was made in order to render notes aſſignable for the encouragement of trade; and therefore notes reſpecting trade only are within it; and that it was under this conſideration that *Lord Chief Juſtice* PARKER, in the caſe of *Smith v. Boheme*, ſaid, that the ſtatute only extended to caſh notes, and to ſuch caſh notes only by which an immediate benefit or intereſt veſted in the aſſignee. The caſe in 4. *Mod.* 242. is like the principal caſe, which was held not to fall within the cuſtom of merchants, becauſe it being to pay money upon ſuch an uncertain event cannot be called trading. In the preſent caſe the party, if he was to aſſign, would have no debt, no benefit, no intereſt in him at the time of aſſigning, and therefore the note cannot be within the ſtatute. And we are now of opinion, that promiſſory notes

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(a) 12. Viner, 208.

(b) 1. Stra. 24.

BARNESLY *againſt* BALDWYN.

made payable when a certain ſhip which is returned ſhall be paid off, are good for the reaſons my *Lord Chief Juſtice* PARKER gave in the caſe he cited in *Appleby v. Biddle.*

The judgment was arreſted (*a*).

(*a*) See Evans *v.* Underwood, 1. Wilſ. 262. Dawkes *v.* Deloraine, 3. Wilſ. 207. 1. Black. Rep. 782. Banbury *v.* Liſſett, 2. Stra. 1211. Haydock *v.* Lynch, 2. Ld. Ray. 1563. Roberts *v.* Peake, 1. Burr. 323. Carlet *v.* Fancourt, 5. Term Rep. 482.

Caſe 338. Doe, on the Demiſe of the Ducheſs Dowager of Hamilton, *againſt* Atherly and Others.

If an ejectment be brought on the demiſe of huſband and wife, the wife is included in a rule of court that "*dimiſſor' querentis* ſhall "pay the coſts," and if, after the death of her huſband, ſhe bring a new ejectment for the ſame premiſes, the court of *king's bench* will ſtay the proceedings until the coſts in the former action be paid (*a*), although ſuch action was brought in, and the rule for coſts made by, the court of *common pleas.*

S. C. 2. Stra. 1152.
1. Stra. 681.
2. Black. Rep. 1180.

THIS was A MOTION to ſtay proceedings, in an action of ejectment, till coſts ſhould be paid upon a former ejectment, which had been brought by the preſent *Ducheſs of Hamilton*, together with *the Duke* her late huſband, in the court of common pleas, in the year 1710; in which cauſe there was a rule entered into in theſe words, "that in caſe of a nonſuit or verdict againſt "the plaintiffs *dimiſſor' querentis ſit onerabil. cum ſolutione cuſtagior. per Cur. allocand.*"

Upon a trial at bar there was a verdict and judgment for the defendants, which judgment was affirmed in the king's bench, and alſo in the houſe of lords. There was an affidavit that no coſts had been paid by the late *Duke* or the preſent *Ducheſs*, though often demanded; that *the Ducheſs* was the ſurviving leſſor of the plaintiff in the former ejectment; that theſe ejectments were brought for the very ſame lands, and againſt ſeveral of the ſame defendants.

THE COUNSEL *for the Ducheſs* offered ſeveral reaſons to excuſe her from the coſts of the former ejectment.

FIRST, That ſhe was not within THE RULE, it being in the ſingular number, *dimiſſor: querentis ſit, &c.* which muſt mean *the Duke*, for as ſhe was a *feme-covert* ſhe could not make any ſuch demiſe to try her title on the ejectment; and admitting ſhe did not enter into the rule, ſhe is not now liable to the coſts, but the defendants muſt purſue the coſts into the hands of *the Duke*'s repreſentatives.

THE SECOND was, That admitting *the Ducheſs* to be a party to the rule, that the word "*dimiſſor.*" with a turn up to be put for *dimiſſores*, and the word "*ſit*" to be miſtaken for "*ſint*;" yet that *the Ducheſs* being *covert* could not, by entering into rules of court, ſo far involve her conſent therein as to bind her after her huſband's death; that no contract could bind her but that ſolemn one of levying a fine upon record; that entering into rules of court

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(*a*) See Short *v.* King, Stra. 681. 2. Black. Rep. 1180. Hullock on Coſts, 44 are contracts; and that the Courts enforce the execution of ſuch contracts by attachment.

Doe, on the Demiſe of the Ducheſs Dowager of Hamilton, *againſt* Atherly, and Others.

The third was, That as this is a rule of the court of common pleas, the parties ought to have proſecuted for the coſts by attachment in that court; and that this Court cannot enforce the rules of another court.

Fourthly, That this Court will not interpoſe after ſuch a length of time as thirty years. *Comb.* 106. 110.

To this *it was ſaid*, that the length of time was no objection, becauſe *the Ducheſs*, being a peereſs of the realm, was privileged in her perſon, and that it was impracticable to find a perſon ſo hardy as to take her up by attachment, which is the only remedy upon rules of court, for fear of the reſentment of the houſe of lords.

The fifth and laſt was, That as there are only five defendants in the former ejectment that have ſurvived and are entitled to coſts, and are made defendants in the preſent ejectments, together with thirty or forty more perſons, it is not equitable that proceedings ſhould be ſtayed againſt thoſe who were not vexed in a former ejectment, and in no wiſe intitled to coſts.

To this *it was anſwered* by the Counſel on the other ſide, that the Court will take notice that *Mr. Fleetwood* was at all the coſts, and not any of the immediate tenants.

Lee, *Chief Juſtice.* If the defendants had come into this court for an execution of the rule entered into in the common pleas for payment of coſts, they muſt have been diſappointed in their motion; but as this is only a motion to ſtay proceedings on the preſent ejectment till the coſts on an antecedent one are paid off, it is a proper one, and we will grant it, though we have no direct power to inforce *the Ducheſs* to pay coſts accrued in another court.

As to the wording of the rule, I think *the Ducheſs* is clearly comprehended in it, for it appears that this is an ejectment on the demiſe of *the Duke* and *Ducheſs*, whereby they are conſidered as jointenants and as one perſon only, and as ſo included properly enough under the word "*dimiſſor. querentis*" in the ſingular number; and twenty jointenants under the ſame title will be eſteemed as one perſon, and be comprehended under the ſame expreſſion *dimiſſor. querentis.*

As to their being different defendants in this ejectment to what they were in the former, and that we ſhould ſtay proceedings in the preſent one only againſt ſuch as were defendants in the former, and who are intitled to coſts upon the former, I know no precedent of that ſort where proceedings in ejectment have been ſtayed againſt part of the defendants and admitted to go on againſt the other part. And I know no certain meaſure the Court has to go upon in ſuch caſes; for, though there are new defendants, yet it does

Doe, on the Demiſe of the Ducheſs Dowager of Hamilton, againſt Atherly and Others.

does not appear but that they are under-tenants to the perſons who were defendants in the former action.

The reaſon why the Court ſtay proceedings on a ſecond ejectment is to prevent vexation, for it is in the power of a perſon to bring as many new ejectments as he pleaſes, unleſs he has been injoined to the contrary by the court of chancery, which this Court has no power to do. Therefore where a plaintiff has had judgment in a former ejectment againſt him, and is for bringing a new one, we cannot deny it him abſolutely; but as it is a creature of the court, and an equitable proceeding, we grant it him upon paying the coſts, and making the recompence for the vexation he had cauſed in the prior ejectment. 4. *Mod.* 379. If this rule of court was to be conſidered as a matter of mere contract, *the Ducheſs* could not be bound by it, as being a *feme-covert*, and incapable of conſenting to it; but, conſidering the rule of court as a judicial proceeding, ſhe is certainly obliged by it; and theſe rules of courts for payment of coſts by plaintiffs are ſubſtituted by the Court to put the leſſor of the plaintiff in the ſame condition as a real plaintiff in another action. Suppoſe an action is brought by huſband and wife, and they are nonſuited, and then the huſband die, I apprehend the wife who is party to the record will be anſwerable for the coſts. The equity for the defendants, in the preſent caſe, ſeems to be very ſtrong; for ſuppoſe the huſband in this ejectment ſhould die, who is leſſor of the plaintiff, the leſſee may notwithſtanding go on, and the wife will be entitled to the recovery, and ſhall have coſts againſt the defendants: but ſuppoſe the leſſee is nonſuited, or a verdict againſt him, in what condition will the defendant be if the wife is not liable? Why, he can have no coſts at all; not againſt the leſſee, who is plaintiff, for he is only an imaginary and fictitious perſon. Beſides, ſeeing *the Ducheſs* is ſurviving leſſor of the plaintiff in the former ejectment, and conſequently will be preſumed to proceed upon her title of ſurvivor, which will depend upon the ſame title as in the former ejectment, namely, the deed which created the jointenancy; if ſhe proceed upon another title, ſhe ought to ſet it forth by affidavit on her ſide; and ſince the ejectment is for the ſame lands and between the ſame parties, I am of opinion to ſtay the proceedings till payment of the coſts.

Page, *Juſtice*, was of the ſame opinion.

Chapple, *Juſtice*. The nature of a proceeding by ejectment is to be conſidered as a creature of this court, in which the leſſor of the plaintiff has a great many advantages, and the preſent one of bringing as many ejectments as he pleaſes by means of this new-invented method of action; becauſe the real plaintiff is a fictitious perſon, ſo that no prior ejectment or judgment can be pleaded in bar againſt him: but if the leſſor of the plaintiff were to be a real plaintiff upon record, he would be as much barred by a judgment in ejectment as in any other action; and I, am of opinion, that by ſuch a rule of court as this the plaintiff is reduced into the ſame circumſtances as an actual plaintiff, and liable to coſts, though he would not have been ſo without the interpoſition of ſuch a rule, becauſe he does not appear upon the record. Suppoſe an ejectment by huſband and wife, the huſband dies, it has been determined in the caſe of *Thurſtout v. Grey* that the leſſee ſhall, notwithſtanding, proceed, becauſe the leſſor being neither plaintiff nor defendant upon the record, his death cannot cauſe any abatement, and the wife ſhall be entitled to recover the term with coſts againſt the defendant, who in equity ought to have the ſame benefit againſt her. This muſt be taken to be the ſame title; for it is ſworn to be by the ſurvivor of the leſſors of the plaintiff; and if there is any new title, it ſhould have come on the part of the defendant to have ſworn it.

DOE, ON THE DEMISE OF THE DUCHESS DOWAGER OF HAMILTON, *againſt* ATHERLY AND OTHERS.

WRIGHT, *Juſtice*, of the ſame opinion.

The rule was made abſolute to ſtay the proceedings till payment of coſts.

Thompſon *againſt* Slicer.

Caſe 339.

ACTION ON THE CASE in *Ireland* on a promiſſory note, by an indorſee againſt the drawer, which went down to trial, and the jury found a verdict that the plaintiff ſhould recover againſt the defendant for his damages the ſum of one hundred and ſixty pounds four ſhillings and ſixpence, and for his expences and coſts ſixpence. The judgment thereupon was in theſe terms: "It is "therefore conſidered, &c. that the plaintiff ſhall recover againſt "the ſaid defendant the ſaid ſum of one hundred and ſixty pounds "four ſhillings and ſixpence, by the ſaid jury in form aforeſaid "found, as alſo the ſum of fifteen pounds twelve ſhillings and ten "pence for his damages which he ſuſtained, as well for the de"fendant's not performing his promiſes and aſſumptions aforeſaid, "as alſo for his expences and coſts." This judgment was removed by writ of error into this court.

Amendment made in an action from *Ireland* on a promiſſory note, by inſerting in the record "*do recover*" inſtead of "*ſhall recover*."

And now IT WAS MOVED to make two amendments by virtue of the 16. & 17. *Car.* 2. c. 8.

THE ONE, that the words "ſhall recover," in the judgment, be altered to "do recover."

THE OTHER, that the ſum of "one hundred and ſixty pounds "four ſhillings and ſixpence" be amended, and that ſixpence given for coſts by the jury be added to it, and that it be made one hundred and ſixty pounds five ſhillings.

IT WAS OBJECTED to the amendment, that the Court cannot amend ſuch judgments as are given in *Ireland*; the words of the ſtatute being, "that if any verdict be given in any action in any of "his majeſty's courts of record at *Weſtminſter*, the counties palatine "of *Cheſter*, *Lancaſter*, and *Durham*, or in *Wales*, no judgment

THOMPSON *againſt* SLICER.

"ſhall be ſtayed or reverſed, &c.;" and that theſe words do not extend to *Ireland*. It was farther objected, that if *Iriſh* judgments are amendable here *(a)*, yet theſe are ſuch faults as are not amendable anywhere within the 16. & 17. *Car.* 2.

LEE, *Chief Juſtice.* I apprehend that it hath been ſettled in the caſe of *Byrne v. Byrne (b)*, that a judgment given in *Ireland* may be amended upon error here in *England*; for it cannot be amended in *Ireland* after it has been removed here by writ of error; for upon error the record itſelf, and not the tranſcript, is removed, and the record is ſo far a record of this court that we cannot tranſmit it to *Ireland*, *Yelv.* 117, 118.: and though the firſt words of the ſtatute extend only to the courts of *Weſtminſter*, *Cheſter*, *Lancaſter*, and *Durham* and *Wales*, yet there are general words in the cloſe of the firſt ſection that take in *Ireland*. The words are, that all ſuch omiſſions as are before enumerated in that act of parliament, and "all other matters of the like nature, "not being againſt the right of the matter of the ſuit, nor whereby "the iſſue or trial are altered, ſhall be amended by the Juſtices "or other Judges of the courts where ſuch judgments are or ſhall "be given, or whereunto the record is or ſhall be removed by "writ of error." The caſe of *Byrne v. Byrne* was a writ of error out of *Ireland* upon a judgment in dower, in which there were two *miſericordia's*, and it was moved to ſtrike out one, which amendment was accordingly made: ſo in *Sir T. Jones*, 199. a judgment in *Ireland* was amended in this court, though before the making of this ſtatute.

As to THE OTHER OBJECTION, that judgments are not amendable within this ſtatute, becauſe judgments are not expreſsly named in the enumerating part of the ſtatute, I think they are amendable within the general words, that "all other matters of the like na-"ture with thoſe particularly enumerated not being againſt the "right of the ſuit, nor whereby the iſſue or trial is altered, ſhall "be amended accordingly." Several judgments have been amended thereby, which I ſhall mention in this caſe.

It being therefore plain, that not only a judgment, but a judgment out of *Ireland*, may be amended, it may be proper to conſider the amendments prayed for upon the preſent judgment.

THE FIRST is, that the word "ſhall" may be altered to "do." There have ſurely been ſuch amendments as this in the court; the caſe of *Forſter v. Blackwell (c)* was upon a judgment entered up in theſe words, that the plaintiff "ought to recover," which was amended to "do recover;" and the *Caſe of Blackey and Birmingham* in this court, *Eaſter Term*, 13. *Geo.* 2. was, that the plaintiff "ſhould recover," and the judgment was altered to "do recover."

THE SECOND is, that the judgment may be amended from the verdict, and that the ſixpence given for coſts in the verdict and

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(a) See now the ſtatute 22. Geo. 3. c. 53. and 23 Geo. 3. c. 28.

(b) Mich. Term, 8. *Geo.* 2.

(c) 1. Barnes Notes, 11.

Thompson *againſt* Slasser.

omitted in the judgment, may be now added in the judgment. This laſt ſeems to me very much to depend upon this, whether there be ſufficient authority to amend upon the foot of miſpriſion; and I am of opinion that there is, for there was enough found upon the verdict to enter up the judgment in the form it is now prayed to be; and I think the caſe of *Fuller v. Smith* (a) is ſtrong in point: that was an action of treſpaſs, in which the jury found the defendant guilty as to part of the treſpaſs, and as to the reſidue not guilty; upon the entering up the judgment, that part of the verdict which acquitted the defendant was omitted; and yet it was held amendable as a miſpriſion, becauſe there were ſufficient findings with the verdict to have guided the entrance of the judgment by; and the verdict is a ſufficient warrant or authority to amend the judgment by, the judgment being grounded upon the verdict.

Chapple, Page, and Wright, *Juſtices*, agreed; but the Court, notwithſtanding, ſaid, they would conſider farther of it; and now, on the laſt day of the Term,

Lee, *Chief Juſtice*, delivered the opinion of the whole Court in theſe words: It is our unanimous opinion that the amendments prayed for may be granted. The true diſtinction in relation to amendments of judgments before the ſtatute of 16. & 17. *Car.* 2, ſeems to be this, That where miſtakes in judgments were in any matter in which the clerk had no inſtructions in the record to guide the clerk in his entry of the judgment, ſuch miſtakes were not amendable, excluſive of the ſtatute of *Charles the Second*, becauſe they were conſidered as errors and faults of the courts; but if the clerk had ſufficient inſtructions, his miſtakes were amendable. Before the ſtatute of *Charles the Second* there are numberleſs authorities to prove this diſtinction, but I ſhall only cite two or three, *Cro. Eliz.* 497. 1. *Roll. Abr.* 205, 206, 1. *Vent.* 133. 2. *Lev.* 22. The firſt amendment, which prays that the word "ſhall" be altered to the word "do," ſeems to be a caſe that would fall under the determination of making no amendment, as being a fault of the Court; but this miſtake is made amendable under the ſtatute of *Charles the Second.* The ſtatute gives ſome inſtances of judgments that could not be amended before this ſtatute; as the entry of a *capiatur* inſtead of a *miſericordia* could not be amended before this ſtatute, as being a fault of the Court; ſo "*conceſſum eſt*" for "*conſideratum eſt*" could not be amended, for that is not the language of the Court. The objection to the preſent amendment being within the ſtatute of *Charles the Second* is, that this ſtatute, as to the firſt part, is to be conſidered as a ſtatute of Jeofails and not of amendments; and to be ſure that is true, for the words are, "that no judgments ſhall be arreſted for want of "form, &c," that the ſtatute then names the courts, and confines them to *Weſtminſter*, the counties palatine, and *Wales*; but at the end of the ſtatute there are more general expreſſions, which make it a ſtatute of amendments. It is then objected, that the words "ſuch judgments" muſt relate to the judgments given in the courts before mentioned in the beginning of the ſtatute, viz. *Weſtminſter*, &c. and that they cannot extend to judgments given in *Ireland*; but we apprehend the juriſdiction this Court has always exerciſed over judgments in *Ireland*, will bring it within the caſe of other inferior courts: and it is a rule, that wheresoever the court below has power to make amendments in its records, this Court has the like power by law to make ſuch amendments, when the records are removed into this court by writ of error. Now this ſtatute is expreſly enacted in *Ireland*; and as we are of opinion the Court in *Ireland* might make ſuch amendments by the ſtatute, we alſo may do it. And we ſee no difference between the court of king's bench in *Ireland* and the court of common pleas in *England* as to this purpoſe, for we have exerciſed this power of amending the records of both courts indifferently. There are precedents of our amending judgments in *Ireland* in 1. *Roll. Abr.* 209. 1. *Vent.* 117.

(a) Mich. Term, 1. Geo. 2.

What LEE, *Chief Juſtice*, added was to the ſame purpoſe as what he had above mentioned on the former day.

And it was now determined to grant the amendments as prayed.

Caſe 340.

Smith and Palmer *againſt* Scarffe and Abbott.

An acceptance "to pay a bill "of exchange "when certain "goods are "ſold," is a good acceptance, though conditional.

S. C. 2. Stra. 1152.
2. Stra. 1212.

ACTION upon a bill of exchange againſt the acceptor. The plaintiff declared upon this ſpecial acceptance, viz. "to pay the bill when goods ſent by the drawer to the acceptor "ſhould be ſold." There was an averment in the declaration that the goods were ſold; and a verdict for the plaintiff.

IT WAS NOW MOVED *in arreſt of judgment*, becauſe ſuch a ſpecial acceptance as is laid in the declaration will not bind the acceptor, it being uncertain when the goods ſhall be ſold.

LEE, *Chief Juſtice*, declared the opinion of the Court in theſe words: It was an obſervation of my *Lord Chief Juſtice* HOLT, that though the acceptor of a bill of exchange makes himſelf a debtor by the cuſtom of merchants, yet he is properly a debtor at common law, for an acceptance amounts to a promiſe at law to pay, and this grounded on a regard had to trade. Adopting this rule the queſtion will be, What ſort of acceptance it is that amounts to a promiſe to pay at common law? It has been adjudged, that an acceptance of a bill of exchange will bind the acceptor, though not made according to the tenor of the bill drawn; as an acceptance to pay *ſecundum tenorem billæ* after the bill is lapſed is a binding acceptance (*a*); ſo an acceptance for a longer time than the bill is drawn is binding (*b*). The caſe of *Wamber-*

(*a*) Salk. 129. Carth. 466.

(*b*) Molloy De Jure Marit. 204.

caſe

Smith and Palmer *againſt* Scarffe and Abbott.

loffe v. Keene (a) bore two arguments, and was adjudged in *Michaelmas Term*, in the ſixth year of *George the Second*, that an acceptance of a bill in part is good, and ſhould bind for no more than the part ſo accepted; and *Lord Chief Juſtice* Eyre thought an acceptor muſt anſwer only for ſo much as he has accepted, for he is bound by his own acceptance. A man is not tied down to a general acceptance, but may accept a bill under what reſtrictions he pleaſes; as to pay part in money and part in bills; which is the caſe in *Comb.* 452. where it was proved by merchants, that there might be a qualification of an acceptance; for he who may refuſe a bill *in toto* may in part, and may accept it for part, if the perſon to whom the bill is payable will agree to take it ſo; but it is in his power either to agree to ſuch acceptance or to return the bill. So alſo a perſon may accept a bill conditionally; which was the caſe of *Corr v. Coleman* (b): A foreign bill of exchange was drawn upon the defendant *Coleman*, and was returned for want of acceptance; *Coleman* then ſaid, "If the bill is brought back, I will pay it;" which was adjudged by the Court a good acceptance, though a conditional one. And we are of opinion, that if a drawee accept to pay part of a bill only, he ſhall not be charged with the unaccepted part, but the drawer ſhall be ſecurity for and anſwer that. Therefore, upon the authority of theſe caſes and the reaſon of the thing, the rule for arreſting judgment muſt be diſcharged (c).

(a) Eaſter, 4. *Geo.* 2.

(b) Mich. Term, 6. *Geo.* 1. Cun. on Bills of Exchange, 27.

(c) See Banbury *v.* Liſſett, 2. Stra. 1212. Julian *v.* Shobroke, 2. Wilſ. 9. Sprout *v.* Matthews, 1. Term Rep. 182.

Wilder *againſt* Hendy.

Caſe 341.

In treſpaſs for killing the plaintiff's dog, if the *declaration* is by recital, "Whereas, &c." the Court, after verdict, will permit it to be amended by *the bill*.

THIS was a motion, after a verdict for the plaintiff to amend the record of *niſi prius* and the *iſſue roll* by *the bill* on the file (a), by ſtriking out the word "Whereas" in an action of treſpaſs for killing the plaintiff's dog. *Cro. Jac.* 587. *Forſter v. Blackwell*, *Eaſter Term*, in the tenth year of *George the Second*. 8. *Co.* 161, 162.

S. C. 2. Stra. 1151.

It was said *againſt the amendment*, that the declaration beginning by the word "Whereas," which is more than a recital, and no poſitive allegation of any part, is not amendable, becauſe matter of ſubſtance. In caſe, covenant, &c. "Whereas" is good, becauſe it is only inducement, and that which is the *git* of the caſe afterwards poſitively alledged. Suppoſe no conſideration was alledged in *aſſumpſit*, this Court cannot amend. Want of certainty is not amendable by the ſtatute of 16. & 17. *Car.* 2. c. 8. which is the only act on which this amendment cannot be made. *Cooper v. Spencer* (b).

(a) The Court would not permit the time of filing the bill to be enquired into.

(b) 8. Mod. 376. S. C. 1. Stra. 641.

WILDER *againſt* HANDY.

IT WAS SAID *on the other ſide*, This comes within the proviſo of the ſtatute of 16. & 17. *Car.* 2. c. 8. becauſe it will alter the iſſue, none being joined as it ſtood on the recital (a). In the caſe of *Smith v. Blackerly* (b), in trover for a gelding, it was moved to amend the *niſi prius* roll by *the bill*, by altering *the defendant's* name to *the plaintiff's*; and the Court amended it.

LEE, *Chief Juſtice.* The objection without an amendment is ſufficient to arreſt the judgment, and the amendment cannot be made without ſomething to amend by. It appears, that here is a bill on the file, and we cannot take notice when it was filed, but muſt take it to be filed before the record of *niſi prius* was made up. The queſtion then will be, Whether the clerk's not purſuing his inſtructions, though in a matter of ſubſtance, is not a miſpriſion? The rule that I have obſerved to prevail is, whether the clerk had a proper foundation to make up the record right, and whether the amendment did not extend to affect the authority of the Judge at the trial of the cauſe. This amendment does not; for the enquiry upon this iſſue could only be, whether the defendant killed the plaintiff's dog, which muſt have been if the declaration had been right. In the caſe of *Smith v. Fowler* (c), trover againſt fifteen; the plaintiff in laying the converſion had omitted one of the defendants; all pleaded "not guilty;" and after verdict, though no iſſue was joined as to one, yet the Court amended the declaration; for it is ſuppoſed there was evidence againſt them all, or elſe the Judge would not have admitted the verdict. In the preſent caſe, here is a bill to amend by; and as this is right, we muſt look on the miſtake as a miſpriſion of the clerk, and ſo amendable.

The rule was made abſolute.

(a) See Yelv. 65. Cro. Car. 204.

(b) Mich. Term, 13. *Geo.* 2.

(c) Mich. Term, 8. *Will.* 3. in the common pleas, 1. Ld. Ray. 116.

MICHAELMAS

MICHAELMAS TERM,

The Fifteenth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt. Chief Juſtice.*
Sir Francis Page, *Knt.*
Sir William Chapple, *Knt.* } *Juſtices.*
Martin Wright, *Eſq.*
Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Dent *againſt* Coates.

Caſe 342.

Prohibition granted after conſultation on re-ſtating a cuſtom which had been before defectively alledged.

S. C. 2. Stra. 1145.

LIBEL IN THE SPIRITUAL COURT for not paying a poor's rate, where a cuſtom pleaded, and a *prohibition* granted. The cuſtom was traverſed, and found by the jury. A *conſultation* was awarded by the court of king's bench, becauſe the cuſtom found was unreaſonable, and againſt law (*a*).

The plaintiff now altered the cuſtom, and ſet it out differently, and moved for another prohibition, and inſiſted, that the merits of the caſe were never tried, and that the conſultation was awarded merely becauſe the cuſtom was not well ſet out, being uncertain, and therefore againſt law; and cited *Stroud v. Hopkins* (*b*), where the difference is taken between a conſultation being awarded for any fault of the prohibition in form, and where it is granted upon the right of the thing in queſtion; in the former caſe, a ſecond prohibition will lie, in the latter it will not.

The defendant inſiſted on the 50. *Edw.* 3. c. 4. which ſays, "that no prohibition ſhall be allowed after conſultation duly granted, "ſo as the matter in the libel be not changed;" and cited *Cro. Eliz.* 277. 1. *Leon.* 130. *Trenchen v. Metcalfe*, 1. *Jones*, 231. *Cro.*

(*a*) See 2. Stra. 1145.

(*b*) Cro. Car. 208. 2. Brownl. 247.

Car. 208. *Stroud v. Hopkins*, 1. *Roll. Rep.* 378. *Carth.* 463. *Poole v. Gardner.*

LEE, *Chief Juſtice.* A prohibition muſt go; and then the defendant may either plead or demur to it, and may alſo take advantage of this exception.

WRIGHT, *Juſtice.* Here the cuſtom has been found as ſet out, but held bad in matter of form only, and is according to the diſtinction laid down in *Stroud v. Hopkins*, *Cro. Car.* 208. The merits have never been determined, ſo that the plaintiff has not had the effect of his prohibition. The queſtion ſhould be determined by verdict, nonſuit, &c.

LEE, *Chief Juſtice.* If a perſon libel on a cuſtom, he may proceed on it in the ſpiritual court, if it is admitted between the parties; but if the cuſtom be inſiſted on by the one ſide, and denied by the other, a prohibition muſt go *pro defectu* of a trial in their court, for they can try it only by depoſitions, whereas it ought to be tried by a jury.

A prohibition was granted PER TOT. CUR.

Caſe 343.

Hayſman *againſt* Moon.

A deviſe to *A.* for life, with remainder to *B.* ſhe paying to each of her ſiſters 500*l.* conveys to *A* an eſtate in fee.

WRIT OF ERROR to reverſe a judgment given in the common pleas for the defendant on an ejectment.

A SPECIAL VERDICT found, that *Suſannah Morley* being ſeiſed in fee of the premiſes in queſtion deviſed them as follows: "As to "my lands in *C.* I give them to my ſiſter *Dame Mary Fagg* for her "life; and after her deceaſe to her youngeſt daughter *Suſannah*, "ſhe paying to each of her ſiſters, *Elizabeth* and *Mary*, five hun"dred pounds a-piece (the ſurvivor to take the whole); and if the "ſaid *Suſannah* die before her mother, I will that the farm be "equally divided between her two ſiſters *Elizabeth* and *Mary*; "and if they all three die before their mother, I will it deſcend to "the right heirs of my ſiſter *Dame Mary Fagg* for ever." That the teſtatrix died; that *Sir John Fagg*, the huſband of *Dame Mary*, entered in right of his wife; and that they had iſſue ſeven ſons and three daughters, *Elizabeth*, *Mary*, and *Suſannah*. *Suſannah* died in the life-time of her mother *Dame Mary* without iſſue. *Mary*, another ſiſter, married one *Spence*, and died alſo in the life-time of her mother, but left iſſue a ſon, who entered into a moiety on the death of *Dame Mary Fagg*. *Elizabeth*, the other ſiſter, married one *Gall*, who alſo entered into a moiety in right of his wife, and levied a fine with *Elizabeth*, and died without iſſue.

The preſent ejectment was brought by the heir at law of *Elizabeth*, one of the daughters of *Dame Mary Fagg*, to whom the premiſes were deviſed on *Suſannah*'s dying before her mother *Dame Mary Fagg*, againſt the heir at law of *Sir Robert Fagg*, who was the

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eldeſt ſon and right heir of *Dame Mary Fagg*, and alſo heir at law to the teſtatrix *Suſannah Morley*.

The two queſtions were,

FIRST, Whether the two ſiſters *Elizabeth* and *Mary*, who ſurvived their ſiſter *Suſannah*, took an eſtate in fee in common, or only an eſtate for life, by the will?

SECONDLY, Whether this ejectment is well brought for a moiety of the premiſes, or ought to have been brought for an undivided moiety?

THE COUNSEL *for the plaintiff in error* (the defendant in the ejectment) argued, that *Elizabeth* and *Mary* took only an eſtate for life, for that here are no words to carry a greater eſtate to them; and as they are not directed to pay any ſum over, they can have no loſs by not taking a greater eſtate than for life: that the teſtatrix's intention cannot prevail unleſs it be agreeable to the rules of law; and in this deviſe there are no words which, by the rules of law, will carry a greater eſtate to *Elizabeth* and *Mary* than for life *(a)*: that the plaintiff is complete heir, being both heir at law to the teſtatrix, and right heir to *Dame Mary*, ſo as to take under the will, and therefore is not to be diſinherited by ambiguous words, or by a conſtructive implication *(b)*. It is plain from the laſt clauſe of the will, that the teſtatrix knew what words would paſs a fee, for ſhe has there made uſe of them. As therefore no ſuch words are uſed in the deviſe to *Elizabeth* and *Mary*, it muſt be ſuppoſed ſhe did not intend they ſhould have ſo great an eſtate in the premiſes. And it is expreſsly ſaid, that if all the daughters died before their mother, it ſhould go over to another perſon; which ſhews the teſtatrix had no regard to their children; and it is obſervable, that no words of inheritance are uſed until after the deviſe to *Elizabeth* and *Mary*.

As to THE SECOND POINT, It does not appear that any partition was ever made of this eſtate; and therefore the ejectment ought to have been brought for the whole premiſes, or for an undivided moiety in general; for as it is now brought, it will be making a partition by ejectment, for the ſheriff muſt put the plaintiff in poſſeſſion of a moiety, and by that means will divide the eſtate, which cannot be done in this way *(c)*.

THE COUNSEL *for the defendant.*—*Elizabeth* and *Mary* take an eſtate in fee. There are no preciſe words neceſſary to paſs an eſtate by will, but the intention of the teſtator is principally to prevail; and that is to be collected from the whole of the will taken together, and is to

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(a) Co. Lit. 9. b. 1. Roll. Abr. 834. pl. 11. 13. Dyer, 357. Cro. Car. 157. 368. Cro. Eliz. 52. 330. 497. 3. Leon. 150. Moore, 464.

(b) Vaugh. 262. 267. Daliſon, 13. 2. Levin. 129. 194. 1. Cro. 52.

(c) Litt. "Tenants in Common." 1. Inſt. 187. Litt. ſect. 315. Cro. Eliz. 144. Savil. 28. Co. Lit. 199 b. Raſt. Ent. 256. Co. Ent. 195. Hutt. . 1. Lev. 84. 1. Inſt. 32. Litt. ſect. 44.

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receive a liberal conſtruction; and the intention of the teſtator is to govern the words of the will as much as the ſtrict rules of law are thoſe of a conveyance. The teſtatrix ſhews, that ſhe intended the premiſes in queſtion for the benefit of her ſiſter's daughters, and to prefer them before the ſon's; and of the daughters ſhe intended the chief benefit to *Suſannah* the youngeſt, to whom ſhe firſt deviſed them, and directs her to pay five hundred pounds to each of her two ſiſters; but if *Suſannah* die before ſhe come to the poſſeſſion of the eſtate (till which time the legacies of five hundred pounds each are not to be paid), then it is given to the other two ſiſters in lieu of their five hundred pounds. Now it is plain, the teſtatrix intended that *Elizabeth* and *Mary*, on the death of their ſiſter *Suſannah* before their mother, ſhould have as great, if not a greater, benefit from this eſtate than they would have had if *Suſannah* had ſurvived their mother; and in that caſe they would be entitled to five hundred pounds a-piece abſolutely, which would have gone to their children from their deaths. If therefore they ſhould take only a life eſtate in theſe lands, they may be conſiderable loſers by their ſiſter's death, and will not have ſo great a benefit by the deviſe as if the five hundred pounds had been paid to them, which the teſtatrix could not intend. It is plain, that *Suſannah*, had ſhe taken, would have taken a fee, by its being directed that ſhe ſhould pay five hundred pounds to each of her ſiſters *(a)*. And as *Elizabeth* and *Mary* take the eſtate inſtead of the five hundred pounds, it muſt be intended they ſhould have as great an eſtate; for though the eſtate is not charged to them with the payment of any money, yet unleſs they have a fee, they may not receive ſo much from the eſtate as they would have done from the five hundred pounds a-piece, and in this ſenſe may be loſers by having the eſtate; but the law will always give ſuch an eſtate to the deviſee as is ſufficient to ſupport the purpoſe and intention for which the deviſor deviſed it. Here then the teſtatrix intended the eſtate in lieu of the five hundred pounds a piece; and unleſs they have a fee, it will not anſwer the teſtator's intention. So is *Shaw v. Weigh*, *Eq. Caſes Abr.* 176. The heir at law is here excluded by expreſs words, for it is particularly directed that he ſhall not have the eſtate unleſs all the three daughters died in the life-time of their mother, which has not happened (*b*).

As to THE SECOND POINT, The ejectment is well brought for a moiety only, for the plaintiff can recover only *pro tanto*; and the ſheriff will deliver a moiety only on the execution, which will not amount to a partition.

LEE, *Chief Juſtice*, delivered the opinion of the Court. On this ſpecial verdict and will two queſtions have been made: FIRST, What eſtate *Suſannah*, the youngeſt daughter of *Dame*

(*a*) 6. Co. 16. 3. Co. 20, 21. Benlowe, 56. Cro. Jac. 527. 2. Mod. 25. Cro. Eliz. 378. Cro. Jac. 599. Cro. Car. 158. *et al.*

(*b*) Moore, 127. 3. Mod. 45. 2. Show. 249. 1. Roll. Abrid. 843. 2. Ventr. 288. 1. Chan. Caſes, 196.

Mary Fagg, took by the will? SECONDLY, What eſtate *Elizabeth* and *Mary*, the two other ſiſters, took? And A THIRD QUESTION has been made on the verdict and judgment, that the judgment is to recover the term entirely, whereas they being tenants in common, it ought to have been for an undivided moiety.

As to THE FIRST QUESTION, We are all of opinion, that *Suſannah* took an eſtate in fee. The premiſes are given to *Dame Mary* for life by expreſs words, then to *Suſannah*, paying to her ſiſters five hundred pounds a-piece, and on *Suſannah*'s death to be divided among the ſurviving ſiſters; and if all three died before their mother, then to the right heirs of *Dame Mary Fagg* for ever. *Suſannah* being directed to pay a groſs ſum of five hundred pounds to her two ſiſters, the conſtruction muſt be, that ſhe ſhould take an eſtate in fee, and upon this principle, that ſhe may not have any loſs by the deviſe, which ſhe may have if ſhe take only an eſtate for life. This has been ſo often ſettled, that it is not now to be diſputed. In the caſe of *Read v. Hatton (a)* it is ſaid, if there be a poſſibility of a loſs, though a great improbability of one, it ſhall paſs an eſtate in fee, where the deviſe is on paying a ſum of money (*b*); and there is no caſe to the contrary, except one in *Daliſon*, 13, 14. which is not law.

But this caſe was endeavoured to be diſtinguiſhed from the common caſe of paying a ſum of money, becauſe here is a deviſe over; and in that caſe the firſt deviſee ſhall not have a fee; and to this purpoſe was cited *Bacon v. Hill (c)*, where a man deviſed a ſeparate tenement to his three ſons ſeverally, and that if one or two of them died, his part ſhould go to the ſurvivor or ſurvivors; and further, ten pounds to each of his three daughters, to be paid out of his land by every one of his ſons; and it was held, that the ſons ſhould not have a fee-ſimple in their tenements; for although it be deviſed that everyone ſhould pay a conſideration, to wit, ten pounds, yet it being further limited, that after the death of every of them it ſhould remain over, that ſhews his intent that the firſt deviſee ſhould have it for his life only, notwithſtanding that limitation of the payment. And it was ſaid, that this conſtruction of a fee to *Suſannah* was prevented by the direction, that if *Suſannah* died the lands ſhould go to the ſurvivor of the ſiſters *Elizabeth* and *Mary*, ſo that *Suſannah* was only a tenant for life. But I do not think that this caſe of *Baron v. Hill* is applicable to our caſe, becauſe there was an expreſs deviſe over after the deaths of the firſt deviſees; but here it is, if all the three daughters die before their mother, then the

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(*a*) 2. Mod. 25.

(*b*) See 1. Roll. Abr. 834. 2. Roll. Rep. 80. Dyer. 371. 6. Co. 16. Cro. Eliz. 204. 2. Vern. 106. Cro. Jac. 591. 599. Cro. Car. 196. Salk. 685. Pollexfen, 399. Cro. Eliz. 378. 2. Jones, 107. 2. Lev. 249 1. Chan. Rep. 191. Hob. 65. 2. Show. 49. 3. Com. Dig. "Deviſe" (N, 4.). 2. Bac. Abr. 54. 3. Burr. 1535. 1542. 1. Black. Rep. 537. 2. Black. Rep. 1041.. Cowp. 352. 833 Doe on the Demiſe of Paterſon *v.* Richards, 3. Term Rep. 356. Doe on the Demiſe of Baker *v.* Stocker, 5. Term Rep. 13. Andrews *v.* Stonehouſe, 5. Term Rep. 272. Moor *v.* Miller, 5. Term Rep. 538.

(*c*) Moor, 464. Cro. Eliz. 497.

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lands are to go over; and it is not ſaid, "if *Suſannah* die" generally, but "if ſhe die in the life-time of her mother:" and by the firſt part of the clauſe ſhe has an eſtate in fee, and by the latter part it is a fee determinable on her dying in the life-time of her mother; and in that caſe the legacies are not to be paid, becauſe the lands never came to her.

As to THE SECOND QUESTION, What eſtate *Elizabeth* and *Mary* took? We are all of opinion, that the trueſt conſtruction, and the moſt agreeable to the intention of the teſtatrix, which ought to be complied with, is, that they took alſo an eſtate in fee, but determinable on their dying in the life-time of their mother. The eſtate is given to *Dame Mary Fagg* expreſsly for her life, which ſhews that the teſtatrix knew what words are neceſſary to paſs an eſtate for life, which is a very material obſervation; and therefore if a teſtator uſe proper words in one part of the will, the Court will conclude that he would have expreſſed himſelf in the ſame words in other parts of his will, if he intended to give the ſame eſtate; and this was ſo held in *Shaw v. Bull* (*a*), before LORD TREVOR. Therefore, as the premiſes are not given to *Elizabeth* and *Mary* for life in expreſs words, ſo there are no words which ſhew the teſtatrix intended they ſhould have them for life only. Though there are not the ſame terms annexed to the eſtate given to *Elizabeth* and *Mary* as there are to *Suſannah*'s eſtate, yet it is plainly given in lieu of the legacy of five hundred pounds a-piece, which they would have at their own diſpoſal; and it is moſt reaſonable to think, that the teſtatrix intended they ſhould have the ſame power over the eſtate as they would have had over the money. But if it be reſted on that point alone, I ſhould be in doubt whether that would be ſufficient to give them an eſtate in fee or not; but the following clauſe puts it beyond all doubt; for there it is appointed at what time the eſtate ſhall deſcend to the heir of *Dame Mary*, to wit, if the daughters all die before their mother, then only it is that the heir is to take; and this muſt happen previous to the land's deſcending to the heir. The plea of heirſhip cannot control the plain words of a will; though I agree, no ſtrained conſtruction can be made in order to defeat the heir (*b*). But this is a neceſſary implication, and ſuch a one, unleſs we determine againſt the intent of the will, we cannot help conſtruing it an eſtate in fee in the daughters; for if we were to determine that the daughters took an eſtate for life only, it would be ſaying that the heir of *Dame Mary* ſhall take the eſtate on the deaths of the daughters, though they ſurvived their mother, when by the expreſs words of the will it is not to deſcend to the heir of *Dame Mary*, unleſs the daughters died in the life-time of their mother. It is ſaid, the heir ſhall not be diſinherited by any implied intent, and only by expreſs words. But then what intent is meant by this expreſſion which is ſufficient to diſinherit an heir? Why the Judges meant an intent ariſing on the words of the will, and ſuch as may

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(*a*) Mich. Term, 13. *Will.* 3.

(*b*) Denn, on the Demiſe of Gaſkin, *v.* Gaſkin, Cowp. 657.

be called a logical neceſſity collected from propoſitions ariſing on the will itſelf. And this appears from the opinion of a great man in the caſe of *Willis v. Lucas* (*a*) : A teſtator deviſed land to his youngeſt ſon for life, paying a rent of ten pounds *per annum* to his eldeſt ſon ; and after the death of his ſaid youngeſt ſon and *Mary* his wife, remainder to the firſt and other ſons of the ſaid youngeſt ſon; and the queſtion was between the heir at law of the teſtator and the wife of the youngeſt ſon, Whether ſhe took an eſtate for life by implication ? or, Whether it was not to deſcend to the heir at law of the teſtator during the wife's life, as an eſtate undiſpoſed of by the will, it not being to go to the ſon of the youngeſt ſon until after his and his wife's death? and *Lord Chancellor* PARKER held, that the widow was entitled to the premiſes during her life by implication ; and he obſerved, that it had been admitted, that if the deviſe were to the heir after the death of the wife, in ſuch caſe ſhe would take by implication; and that in this caſe it appeared to be equally the intention of the teſtator that his heir at law ſhould not have the premiſes, and that they ſhould not deſcend to him, for that the will, appointing that the heir ſhould have a rent of ten pounds a-year out of the lands for his life, plainly implied that he ſhould not have the land itſelf. This was a neceſſary implication from the will itſelf. So in *Higham v. Baker* (*b*), on a deviſe of a reſidue of lands to his youngeſt ſon and to the heirs of his body, after the death of his wife ; and another farm to his wife and youngeſt ſon to pay debts, and after the death of his wife to his ſon in fee; it was held, that after the debts were paid the wife ſhould have an entire eſtate for life, and then the ſon ſhould have it in fee. Theſe caſes ſhew, that the implication muſt ariſe from the words of the will ſhewing the intention of the teſtator ; and the implication was held to be ſo ſtrong, that, in both the caſes, the wife was conſtrued to have an eſtate for life. The rule is, that where all the words of the will may be ſatisfied without carrying the eſtate from the heir, he ſhall not be diſinherited, for he is a favourite of the law ; but the Court muſt give the proper ſenſe to every word, without rejecting anything : and here the implication is neceſſary from the words of the will ; for if we were to conſtrue in favour of the heir at law, theſe words " if all three of them die in the life-time of their mother" muſt be rejected as inſignificant, and importing nothing. It is then ſaid, that the heir in this caſe is not excluded by expreſs words, and therefore cannot be ſaid to be diſinherited. I agree he is not diſinherited poſitively, but it is expreſsly appointed at what time he ſhall take the eſtate, which implies a negative that he ſhall not take before that time comes, which will amount to a poſitive excluſion by expreſs words. A queſtion has been made, Whether, if the lands had been given to them expreſsly for life, that would have diſinherited the heir ? It would not ; for if the words had been to them for life, they would have had no greater eſtate, and what had been undiſpoſed of muſt have gone to the heir at law. But here

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(*a*) 1. Peer. Wms. 472. (*b*) Cro. Eliz. 15.

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lands are to go over; and it is not ſaid, "if *Suſannah* die" generally, but "if ſhe die in the life-time of her mother:" and by the firſt part of the clauſe ſhe has an eſtate in fee, and by the latter part it is a fee determinable on her dying in the life-time of her mother; and in that caſe the legacies are not to be paid, becauſe the lands never came to her.

As to THE SECOND QUESTION, What eſtate *Elizabeth* and *Mary* took? We are all of opinion, that the trueſt conſtruction, and the moſt agreeable to the intention of the teſtatrix, which ought to be complied with, is, that they took alſo an eſtate in fee, but determinable on their dying in the life-time of their mother. The eſtate is given to *Dame Mary Fagg* expreſsly for her life, which ſhews that the teſtatrix knew what words are neceſſary to paſs an eſtate for life, which is a very material obſervation; and therefore if a teſtator uſe proper words in one part of the will, the Court will conclude that he would have expreſſed himſelf in the ſame words in other parts of his will, if he intended to give the ſame eſtate; and this was ſo held in *Shaw v. Bull* (a), before LORD TREVOR. Therefore, as the premiſes are not given to *Elizabeth* and *Mary* for life in expreſs words, ſo there are no words which ſhew the teſtatrix intended they ſhould have them for life only. Though there are not the ſame terms annexed to the eſtate given to *Elizabeth* and *Mary* as there are to *Suſannah*'s eſtate, yet it is plainly given in lieu of the legacy of five hundred pounds a-piece, which they would have at their own diſpoſal; and it is moſt reaſonable to think, that the teſtatrix intended they ſhould have the ſame power over the eſtate as they would have had over the money. But if it be reſted on that point alone, I ſhould be in doubt whether that would be ſufficient to give them an eſtate in fee or not; but the following clauſe puts it beyond all doubt; for there it is appointed at what time the eſtate ſhall deſcend to the heir of *Dame Mary*, to wit, if the daughters all die before their mother, then only it is that the heir is to take; and this muſt happen previous to the land's deſcending to the heir. The plea of heirſhip cannot control the plain words of a will; though I agree, no ſtrained conſtruction can be made in order to defeat the heir (b). But this is a neceſſary implication, and ſuch a one, unleſs we determine againſt the intent of the will, we cannot help conſtruing it an eſtate in fee in the daughters; for if we were to determine that the daughters took an eſtate for life only, it would be ſaying that the heir of *Dame Mary* ſhall take the eſtate on the deaths of the daughters, though they ſurvived their mother, when by the expreſs words of the will it is not to deſcend to the heir of *Dame Mary*, unleſs the daughters died in the life-time of their mother. It is ſaid, the heir ſhall not be diſinherited by any implied intent, and only by expreſs words. But then what intent is meant by this expreſſion which is ſufficient to diſinherit an heir? Why the Judges meant an intent ariſing on the words of the will, and ſuch as may this conſtruction. This caſe is like the preſent, only there it is a deviſe of the inheritances, and here of the farm; and *Saunders* thought it gave an eſtate in fee from the ſpecial appointment in the will at what time the heir ſhould take: and it is on this latter part of the will we give our opinion, by which the heir is not to take the eſtate but upon all the daughters dying in the life-time of the mother.

(a) Mich. Term, 13. *Will.* 3.

(b) Denn, on the Demiſe of Gaſkin, *v.* Gaſkin, Cowp. 657.

As to THE THIRD OBJECTION, It appears the leſſor of the plaintiff is entitled only to a moiety, and therefore it is ſaid that the verdict ought to have been given for an undivided moiety, and the defendants found "not guilty" as to the reſt. But I think there is no foundation for this objection. It does not appear by the verdict that the leſſor of the plaintiff was tenant in common at the time of the demiſe; it is found, that the perſon under whom the leſſor of the plaintiff claims, entered into a moiety; but it does not appear that the leſſor of the plaintiff was tenant in common at the time of the demiſe, for there might be an agreement between the two ſiſters to part it; and we muſt not conclude they are now tenants in common, becauſe they were once ſo; but if they were ſo, there would be no foundation for the objection. Tenants in common are they who hold by ſeveral titles, or by one title on ſeveral rights; and they have ſeveral freeholds, and their right is ſeveral; and an action may be brought by one tenant in common againſt the other for a moiety. If one tenant in common is ouſted, the other may have an ejectment againſt his companion or a ſtranger for a moiety. They cannot make one joint leaſe, but in an ejectment they muſt declare on ſeveral leaſes of their ſeveral parts. They have ſeveral rights, and an ejectment is an action which concerns the right. If a leaſe be made to two, and one make a leaſe of his moiety, the leſſee is tenant in common with the other. And I do not think that this judgment will make any partition or ſeveralty between them; for it was held in *Morrice's Caſe* (*a*), that in an aſſiſe a judgment in ſeveralty between joint-tenants is wrong; and in this caſe, on a recovery of a moiety, the perſon recovering will be in the ſame place and condition with the perſon recovered from, and will hold in common with the other.

We are, therefore, all of opinion, that this is a right judgment which is given in the common pleas.

The judgment was affirmed.

(*a*) 6. Co. 13.

THOMPSON *againſt* SLICER.

"ſhall be ſtayed or reverſed, &c.;" and that theſe words do not extend to *Ireland*. It was farther objected, that if *Iriſh* judgments are amendable here (*a*), yet theſe are ſuch faults as are not amendable anywhere within the 16. & 17. *Car.* 2.

LEE, *Chief Juſtice*. I apprehend that it hath been ſettled in the caſe of *Byrne* v. *Byrne* (*b*), that a judgment given in *Ireland* may be amended upon error here in *England*; for it cannot be amended in *Ireland* after it has been removed here by writ of error; for upon error the record itſelf, and not the tranſcript, is removed, and the record is ſo far a record of this court that we cannot tranſmit it to *Ireland*, *Yelv.* 117, 118.: and though the firſt words of the ſtatute extend only to the courts of *Weſtminſter*, *Cheſter*, *Lancaſter*, and *Durham* and *Wales*, yet there are general words in the cloſe of the firſt ſection that take in *Ireland*. The words are, that all ſuch omiſſions as are before enumerated in that act of parliament, and "all other matters of the like nature, "not being againſt the right of the matter of the ſuit, nor whereby "the iſſue or trial are altered, ſhall be amended by the Juſtices "or other Judges of the courts where ſuch judgments are or ſhall "be given, or whereunto the record is or ſhall be removed by "writ of error." The caſe of *Byrne* v. *Byrne* was a writ of error out of *Ireland* upon a judgment in dower, in which there were two *miſericordia's*, and it was moved to ſtrike out one, which amendment was accordingly made: ſo in *Sir T. Jones*, 199. a judgment in *Ireland* was amended in this court, though before the making of this ſtatute.

As to THE OTHER OBJECTION, that judgments are not amendable within this ſtatute, becauſe judgments are not expreſsly named in the enumerating part of the ſtatute, I think they are amendable within the general words, that "all other matters of the like na"ture with thoſe particularly enumerated not being againſt the "right of the ſuit, nor whereby the iſſue or trial is altered, ſhall "be amended accordingly." Several judgments have been amended thereby, which I ſhall mention in this caſe.

It being therefore plain, that not only a judgment, but a judgment out of *Ireland*, may be amended, it may be proper to conſider the amendments prayed for upon the preſent judgment.

THE FIRST is, that the word "ſhall" may be altered to "do." There have ſurely been ſuch amendments as this in the court; the caſe of *Forſter* v. *Blackwell* (*c*) was upon a judgment entered up in theſe words, that the plaintiff "ought to recover," which was amended to "do recover;" and the *Caſe of Blackey and Birmingham* in this court, *Eaſter Term*, 13. *Geo.* 2. was, that the plaintiff "ſhould recover," and the judgment was altered to "do recover."

THE SECOND is, that the judgment may be amended from the verdict, and that the ſixpence given for coſts in the verdict and

omitted

(*a*) See now the ſtatute 22. *Geo.* 3. c. 53. and 23 *Geo.* 3. c. 28.

(*b*) Mich. Term, 8. *Geo.* 2.

(*c*) 1. Barnes Notes, 13.

Wright, *Juſtice*. The ſtatute of 23. *Hen.* 8. c. 2. does not mention *cock-fighting*, but in 2. *Show.* 36. it was held, that cock-fighting is an unlawful game within that act, as it is particularly mentioned by the ſtatute of 16. *Car.* 2. Here the words are "*or any other game whatſoever.*" Betting is of itſelf gaming, be it at any diverſion; and I think that gaming at a *horſe-race* is as much ſo as at a *hazard table*.

Judgment for the defendant (*a*).

(*a*) But now by 13. *Geo.* 2. c. 19. horſe-racing is allowed under the regulation deſcribed in the act.

Oates *againſt* Jackſon.

Caſe 345.

On a deviſe "to "*A.* for life, "and after her "death to *B.* "and to the "children of "her body begotten or to be "begotten by *C.* "her huſband, "and to their "heirs for "ever;" if one child be born at the time of the teſtator's deceaſe, this creates a *jointenancy* between *B.* and her children.

S. C. 2. Stra. 1172.
3. Com. Dig. "Deviſe" (N. 8.).
Fearne on Cont. Rem. 4. edit. 462.
8. Viner Abr. 239.
5. Term Rep. 324.

THIS is AN ACTION OF TRESPASS AND EJECTMENT, in which the plaintiff declared, that *Elizabeth Hatterſley*, on the firſt of *October*, in the thirteenth year of *George the Second*, demiſed ſixty acres, &c. to the plaintiff, to hold to him and his aſſigns for ſeven years, &c. by force whereof he entered, and was poſſeſſed until the defendant entered and ejected him. To this the defendant pleaded the general iſſue; and at the laſt aſſizes at *York* a caſe was made for the opinion of the Court.

The caſe ſtated, that *Ralph Clay* was ſeiſed in fee of five cloſes of meadow, and other the premiſes in the declaration mentioned, and by his will, dated the eighth of *January* 1693, deviſed the premiſes in the words following: "As for touching and concerning "the five cloſes of meadow called *Woofspark*, I give, deviſe, and "bequeath them to *Annabell* my loving wife for and during the term "of her natural life, and from and after her deceaſe then I give and "bequeath the ſaid cloſes, lands, and premiſes to *Iſabella Addingham*, my daughter, and to the children of her body, begotten or "to be begotten by *William Addingham*, and to their heirs for "ever."

In *April* 1694 the teſtator died ſeiſed of the premiſes, without making any alteration in his will: on his death *Annabell* his wife entered, and continued in poſſeſſion until her death, which happened the fifteenth of *Auguſt* 1698. *Iſabella*, at the time of making the will, had, by the ſaid *William Addingham* her huſband, a daughter named *Elizabeth*, and after the making the ſaid will had ſeveral other children by the ſaid *William Addingham*, viz. a daughter *Iſabel*, born ſoon after the teſtator's death, who died without iſſue; and ſeveral others, all of whom died without iſſue, except *Elizabeth*, (the daughter of *Iſabella Hatterſley*, the daughter born at the time of making the will) who died in 1711 without iſſue. *Annabella* married *Thomas Hatterſley*, who died the ninth of *March* 1729, leaving iſſue a daughter, *Elizabeth Hatterſley*, the leſſor of the plaintiff. The teſtatrix's daughter entered into poſſeſſion of the premiſes after the death of her mother, to whom they were deviſed for life. Soon after the huſband died, and ſhe married *Matthew Jackſon*, by whom ſhe had iſſue *Matthew Jackſon* the defendant, her heir at law. *Iſabella* married, ſurvived all her children by her firſt huſband, and died the eleventh of *July* 1739 in poſſeſſion of the premiſes; and on her death *Matthew Jackſon*, her ſon, entered, againſt whom this ejectment is brought by this *Elizabeth Hatterſley*. *Matthew Jackſon* the defendant's title is as heir at law to his mother *Iſabella*. *Elizabeth Hatterſley*, who is leſſor of the plaintiff, derives her title as grand-daughter to *Iſabella Addingham*, that is to ſay, daughter of *Annabella Hatterſley*, who was the only child of the ſaid *Iſabella*, by *William Addingham* her huſband, that had iſſue.

The point reſerved for the opinion of this Court is, What eſtate in the premiſes paſſes by the will to *Iſabella* the teſtatrix's daughter, and to her children?

Dennison *for the plaintiff.* There is but one way of conſtruction that can ſerve the defendant's purpoſe; and that is, that *Iſabella* took an eſtate of inheritance in fee-ſimple, for without ſuch eſtate the defendant can have no title; on the other hand, if *Iſabella* by the will took an eſtate in ſpecial tail, then the right to the premiſes is in her grand-daughter *Elizabeth Hatterſley*, the leſſor of the plaintiff, as heir in ſpecial tail; or if the fee was in the children of *Iſabella*, the leſſor of the plaintiff, even in that caſe, has a good title.

First, I ſhall conſider whether this limitation in the will "to "*Iſabella*, and the children of her body begotten or to be begotten "by *William Addingham*," does not create an eſtate tail in *Iſabella*, becauſe this ſeems to be the moſt natural conſtruction of this will. It muſt be obſerved, that at the time of making the will *Iſabella* had one child living, named *Elizabeth*, and all the other children of *Iſabella* were born after the death of the teſtator, and on this accident it hath been thought by ſome that this caſe is ſimilar to *Wild's Caſe* (a). But notwithſtanding *Iſabella* had a child born when the will was made, yet this caſe differs very greatly from *Wild's Caſe*. As to that caſe, I own the principal caſe there hath been always allowed to be law, though ſome other matters in it have been often doubted by ſome, I will ſtate the principal caſe there, and compare the preſent caſe with it. In that caſe, lands were given to *A.* for life, remainder to *B* and the heirs of his body, the remainder to *Rowland Wild* and his wife, and after their deceaſe to their children; *Rowland* and his wife had then living a ſon and a daughter; and the Court were of opinion, that *Rowland* and his wife could have no eſtate tail by conſtruction; becauſe, they ſay, had it been in a conveyance, it would have been only an eſtate for life; and as his intention did not appear to have it take effect contrary to the rule of the law, therefore they were of opinion that *Rowland* and his wife had no eſtate for life, remainder over to their children then born. This *Caſe of Wild* is taken notice of by my Lord Hale in 1. *Vent.* 231. and he gives this account of it: He ſays, the reaſon why it was held there to be an eſtate for life in *Wild* and his wife was, firſt, becauſe having limited a remainder in tail to *B.* by expreſs words, that is to ſay, "to *B.* and the heirs of "his body," if he had meant the ſame eſtate in the ſecond remainder, it is likely he would have uſed the ſame words: ſecondly, it was not "after their deceaſe to the children of their bodies;" for if ſo, there would have been an eye of an eſtate tail, that is, it would have looked like an eſtate tail; now, in our caſe, the deviſe is "to the "children of her body begotten:" thirdly, the principal reaſon was, becauſe there were children in being at the time of the deviſe. I obſerve, in the firſt place, that this *Caſe of Wild* is a great while ago, and the Court then had not gone ſo largely into the conſideration how far the word "children" might be a word of limitation; and therefore in *Wild's Caſe* there being a ſon and a daughter living, and no intention appearing that the teſtator intended any other than an eſtate for life in the children, the Court would not extend the conſtruction any farther than what was agreeable to the rules of law; and it is agreed in *Wild's Caſe*, that if it had been limited "to the children of their bodies," it would have been an eſtate tail. And the caſe in 1. *And.* 49. proves it; there the deviſe was "to *William* the ſon for life, and after his death to the men "children of his body," and there it is held to be an eſtate tail: and though my Lord Coke ſays, for he cites this caſe in *Wild's Caſe*, that it did not appear that the teſtator had any iſſue male living at the time of the deviſe, and therefore for that reaſon it was adjudged an eſtate tail; yet on looking into the report of the caſe in 1. *And.* 43. and *Moor*, 397. there is not any notice taken of this thing, or anything that ſhews that this was the reaſon of the judgment; nor any diſtinction in the Books whether there were or were not children living at the time of making the will: and certainly the words "men children of his body" will include all the children; and therefore whether he had or had not children at the time of making the will could raiſe no difference. And it ſeems that Hale, in the caſe of *King v. Melling*, argues from the manner of limitation being "to the children of the body" or "iſſue of the body begotten," which, ſays he, are phraſes agreeable to an eſtate tail. The word "children" in this will is a word of limitation; for the words "heirs," "iſſue," or "children," in a will, are ſometimes words of limitation and ſometimes words of purchaſe, but they are one or the other merely to anſwer the intention of the teſtator. The words "heirs," or "heirs male," naturally and *ex vi termini*, in legal conſtruction, are words of limitation, and yet ſometimes in wills are words of purchaſe: that is proved by *Archer's Caſe*, 1. *Co. Rep.* So the word "iſſue" is ſometimes uſed as a word of limitation, as in the caſe of *King v. Melling*; and ſometimes it is uſed as a word of purchaſe, as in the caſe of *Backhouſe v. Wells*; and ſo the word "children," in *Wild's Caſe*, is uſed as a word of purchaſe; and yet it is there agreed that

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(a) 6. Co. 16.

Oates *againſt* Jackson.

1. Eq Abr. 181.
3. Keb. 42. 52. 95.
1. Vent. 214. 225.
2. Lev. 58.
3. Salk. 296.
Pollexf. 102.

it might be a word of limitation. If the deviſe had been to *Iſabella*, and her children "on her body begotten by her huſband," without going further, it would have been clearly an eſtate tail in *Iſabella*.

Secondly, The next conſideration will be, whether theſe additional words of limitation, "and to their heirs for ever," grafted on the other words in the will, "to the children of her body be-" "gotten," ſhew that theſe words cannot be conſidered as words of limitation but as words of purchaſe. Poſſibly it may be ſaid to be like the caſe of *Backhouſe v. Wells (a)*, where the limitation was "to *John Barber* for life only, and after his deceaſe to his "iſſue male, and the heirs male of ſuch iſſue male;" but in that caſe there was an expreſs deviſe for life, and the next limitation "to "the heir male or iſſue male," which was taken in that caſe to be *nomen ſingulare*, and to be words of purchaſe by reaſon of the additional words annexed to them. But in the preſent caſe the limitation is not "to *Iſabella* for life, and after her deceaſe to her "children," but it is "to *Iſabella* and the children of her body;" which therefore cannot be taken to be words of purchaſe, but muſt be taken to be words of limitation; and the ſubſequent words, "and "to their heirs," do not make any alteration, or enlarge the eſtate firſt given, but by the word "heirs" muſt be intended ſuch heirs as were capable of taking under the limitation in tail, that ſo the will may be conſiſtent. And this conſtruction is not a new one, but it has been held in other inſtances, that limitations of this kind have not been taken to enlarge the eſtate, but that the word "heirs" has been taken in a limited ſenſe. There are caſes to ſhew that the word "heirs" is not always to be taken generally, but with reference to the precedent words; as in *Moor*, 124. lands were deviſed to one and the heirs male of his body, and if he die without heirs of his body, that the lands ſhould remain to a ſtranger; and it was adjudged that the words "heirs of the body," in the condition, ſhall not enlarge the precedent eſtate in tail male, but ſhall be referred to it: and it is ſo laid down as a rule in 1. *Co.* 104. Therefore in the preſent caſe *Iſabella* had an eſtate tail by the firſt point of the limitation; and if ſo, then thoſe latter words "and to "their heirs" will not make any alteration or enlarge the eſtate; and therefore theſe ſubſequent words muſt be conſidered agreeable to the limitation in tail, and the words "their heirs" muſt mean ſuch heirs as were capable of inheriting by the tail. The caſe of *Goodright v. Pulling (b)* was, that *Nicholas Liſle* by will deviſed lands to his wife for her life, and after her deceaſe then to his kinſman *Nicholas L.* during his life, and after his deceaſe then to his heirs male of the body of his kinſman *N. L.* to be begotten, and to his heirs for ever; then the will went on with other immaterial limitations; and the queſtion was, What eſtate *N. L.* had? and the Court were of opinion that this was an eſtate tail in *N. L.* by reaſon of the limitation to "the heirs male of his body," and that the words "his heirs for ever" made no alteration at all. The only difference between that and the preſent caſe is, that the limitation there is "to the heirs males of the body of *N.* and his "heirs for ever," and here it is "to the children of the body be-"gotten by *William Addingham*, and to their heirs for ever;" and the word "children" can make no material alteration in conſtruction, becauſe "the children of the body" in a will, are the ſame as "heirs of the body" in a deed; therefore the preſent caſe is in effect the ſame as if the premiſes had been limited in a deed "to "*Iſabella* and to the heirs of her body begotten by *William Adding-"ham*," in which caſe the additional words "and to his heirs for "ever," would make no alteration (*a*); and there is no more reaſon why the addition of theſe words "and to his heirs for ever," in this caſe, ſhould make any more alteration than they did in the caſe of *Goodright v. Pulling*, in which caſe it was determined that they did not make any alteration at all (*b*). It is impoſſible the teſtator ever could intend to deviſe his eſtate to *Elizabeth*, who was the only child then born; for firſt ſhe ſpeaks of "children" in the plural number; but the ſtronger reaſon is, that ſhe never intended to exclude the after-born children. But if this word "chil-"dren" be conſidered as a word of purchaſe, then *Elizabeth* being the only child then born, ſhe only could take by purchaſe; and the conſequence would be, that all the other children after-born would be excluded from taking under the will, and the eſtate would go to the heirs general of the child then living: this conſtruction can never be imagined to be agreeable to the intention of the teſtator. This inconvenient conſtruction was the real ground of the opinion of Lord Hale in the caſe of *King v. Melling* (*c*); he obſerved there that the eſtate was given "to *Barnard* for life, and after his "deceaſe to the iſſue of his body lawfully begotten on a ſecond "wife," and for want of ſuch iſſue there was as much reaſon to provide for the iſſue of *Barnard*'s iſſue as for the firſt iſſue; and becauſe the teſtator intended that the eſtate ſhould not go over to *John Melling* ſo long as there was any iſſue of *Barnard*, therefore the intention of the teſtator was over-balanced by that, and therefore it was held that *Barnard* had an eſtate tail. So here if the word "children" be conſidered as a word of purchaſe, the eſtate would veſt in *Elizabeth* only, and it would go to her heirs general, and all the other children would be excluded. This inconvenience was likewiſe conſidered in the caſe of *Goodright v. Pulling*.

(a) 1. Eq. Abr. 184. 2. Ld. Ray. 1439. 8. Mod. 262. 10 Mod. 186. Fort. 450. Gilb. 20. S. C. cited 2. Stra. 731.

(b) Mich. Term, 13. Geo. 1. 1. Bar. K. B. 6. 2. Eq. Abr. 315. 2. Ld. Ray. 1437. 2. Stra. 729.

(*a*) See alſo Legate *v.* Sewell, 1. Peer. Wms. 87, Morris *v.* Legay, 2. Burr. 1102. Minſhull *v.* Minſhull, 1. Atk. 411. Wright *v.* Pearſon, Fearne C. R. 187. Amb. 358. King *v.* Burchell, 4. Term Rep. 296. Denn *v.* Perchey, 5. Term Rep. 299.

(*b*) See Blandford *v.* Aplin, 4. Term Rep. 82.

(*c*) 1. Eq. Abr. 181. 3. Keb. 42. 52. 95. 1. Vent. 214. 225. 2. Lev. 58. 3. Salk. 296. Pollexf. 121. Lev. Ent. 98.

Thus far I have conſidered the deviſe as limiting an eſtate tail to *Iſabella*; and if this be right, then the leſſor of the plaintiff has a good title as heir in ſpecial tail. But in order to make out the title under the will to be out of the leſſor of the plaintiff and in the defendant, it has been conceived by ſome that *Iſabella* and her child, who was born at the time of making the will, take a joint eſtate in fee, and conſequently *Iſabella* having ſurvived her daughter *Elizabeth*, the inheritance of the whole eſtate has veſted in her in fee. This conſtruction is already anſwered by conſidering the inconveniences ariſing from the ſuppoſition that this word "children" is to be conſidered as a word of purchaſe: but in the caſe of *Cook v. Cook* (*a*), where a deviſe was to the iſſue of *J. S.* who then had a daughter living and afterwards had a ſon born, the then Lord Keeper was of opinion that all the children ſhould take, and even grand-children if there had been any; and although upon the death of the teſtator there was then only a daughter born, yet upon the birth of another child the eſtate ſhall open and take in the after-born ſon. Then on this way of conſtruing the will the inheritance being in the children of *Iſabella* begotten by *William Addingham*, the leſſor of the plaintiff, who claims as the only ſurviving grand-child of that marriage, has a good title. But it is objected, that this is a joint eſtate in *Iſabella* and her children; the conſequence of which is, that this eſtate would go to the heirs general of *Iſabella* by an after-taken huſband, and this would defeat the intention of the teſtator; for the iſſue of that very marriage, which the teſtator by his will was providing for, would be cut off by this conſtruction; for *Iſabella* married again, and the now defendant is the ſon of that ſecond marriage: therefore upon the whole it muſt be ſubmitted, that whatever conſtruction is made of the will, the leſſor of the plaintiff has a good title as heir in tail; or if, by reaſon of theſe additional words, "and to their heirs," it is not an eſtate tail, even in that caſe the inheritance being limited to the children, the leſſor of the plaintiff has a good title.

Bootle, *Serjeant*, *on the other ſide*, after having ſtated the caſe as above, ſaid, that Mr. Dennison had in vain endeavoured to diſtinguiſh this caſe from *Wild's Caſe* (*b*), having cited no caſe to make out this diſtinction, but only ſaid, that that caſe was of a long ſtanding, and that the law was now altered. But it is impoſſible to conſtrue this to be an eſtate-tail in *Iſabella*, as it appears there were children living at the time of making the will, for ſuch a conſtruction would overthrow many reſolutions in the Books; and the authority of *Wild's Caſe* in this point was never queſtioned; the words of the Book are as full and ſtrong as poſſible to this purpoſe, and are againſt Mr. Dennison's conſtruction. The words are theſe, "If *A.* deviſeth lands to *B.* and to his children or iſſues, and

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(*a*) 2. Vern. 545.

(*b*) 1. Eq. Abr. 181. 6. Co. 16. Moor, 597.

Oates *againſt* **Jackson.**

“ he hath not any iſſue at the time of the deviſe, that the ſame is an “ eſtate tail, for the intent of the deviſor is manifeſt and certain, “ that his children or iſſues ſhould take; and as immediate deviſees “ they cannot take, becauſe they are not *in rerum naturâ* ; and “ by way of remainder they cannot take, for it was not his inten- “ tion, for the gift is immediate. But if a man deviſe lands to “ *A.* and to his children or iſſues, and they then have iſſues of their “ bodies, there his expreſs intent may take effect according to the “ rule of the common law; and no manifeſt and certain intent “ appears in the will to the contrary; and therefore in ſuch caſe “ they will have but a joint eſtate for their lives.” From hence it appears, that the word “ children” in the preſent caſe, according to this reſolution, cannot be conſidered as a word of limitation, becauſe it is directly contrary to the rule of law, as ſtated here, that children living at the time of making the will ſhould take by way of limitation. Since then the word “ children,” in the preſent caſe, muſt be taken to be a word of purchaſe, it follows that the ſubſequent words, “ and to their heirs for ever,” muſt give a joint eſtate in fee. I ſhall therefore contend, FIRST, That the mother and her children took an eſtate in fee as jointenants. *Lord Coke* (*a*) is expreſs, that where *B.* having divers ſons and daughters, *A.* giveth lands “ to *B. et liberis ſuis*, and to their heirs,” the father and all the children do take a fee ſimple jointly, by force of theſe words; and “ their heirs for ever” make it a joint eſtate in fee; and theſe words, “ on the body of her begotten, or to be begotten, by *William Addingham*,” ſhall only be conſidered as a deſcription of what children ſhall take; and the children born after the death of the teſtator ſhall take jointly with their mother and the children born in the life of the teſtator, for on the birth of other children the eſtate ſhall open and take in ſuch after-born children. This is the natural conſtruction to be put on the words of this will, and by this all the words of the will are taken in and will be anſwered; and there is no occaſion to reject any of them, but they are all taken, and conſiſtent with the rules of law. For this purpoſe I ſhall cite the caſe of *Cooke v. Cooke* (*b*), which MR. DENNISON mentioned for another purpoſe. There the deviſe was to the iſſue of *J. S.* who then had a daughter living, and afterwards had a ſon born; and the queſtion was, Who ſhall take, and what eſtate? and THE LORD KEEPER was of opinion, that all the children ſhould take, and even grandchildren if there had been any; but they ſhall take only an eſtate for life: and although the deviſe is to the iſſue begotten, that makes no difference; the words “ begotten and to be begot- “ ten” are the ſame, as well upon the conſtruction of wills as ſettlements, and take in all the iſſue after-begotten; and although upon the death of the teſtator there was only a daughter born, yet upon the birth of another child the eſtate ſhall open and take in the after-born ſon. But he makes a diſtinction of a perſonal eſtate; for by a deviſe of that “ to a man and his children,” a child born

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(*a*) Co. Lit. 9.

(*b*) 2. Vent. 545.

after the death of the teſtator ſhall not take; and there he alſo puts this caſe: A deviſe "to the iſſue of *B.* and for want of ſuch iſſue "to *C. D.*" having a ſon and a daughter, they ſhall take only as perſons deſcribed, and have only an eſtate for life, although the ſubſequent words "for want of ſuch iſſue" ſeem to imply an eſtate tail. The only difference between this caſe in *Vernon* and the caſe now before the Court is this, that the deviſe there was "to the "iſſue of *J. S.*" and there was only one child living and another child born afterwards; and it was held, that they ſhould take a joint eſtate for life; here the deviſe is, "to *Iſabella* and to her "children on her body begotten, or to be begotten, by *W. A.*" And theſe laſt words are only deſcriptive; and therefore it would have been the ſame thing if the teſtator had only ſaid "to her and her "children." The only difference therefore between theſe caſes is, that in the caſe in *Vernon* the word "iſſue" is uſed, and in the preſent caſe the words are, "and to her children." Now "iſſue" hath been held to be more reſpective than the word "children;" for "iſſue" will take in grandchildren, but "children" will not; that is determined in *Tyler's Caſe (a)*. Now this being ſo, then I aſk, How this caſe now before the Court can be diſtinguiſhed from that caſe of *Cooke v. Cooke?* Here the deviſe is, "to *Iſabella* and "to her children;" and there being a child then born, it is impoſſible that this, according to the conſtruction of law, can be an eſtate tail in *Iſabella*, but the eſtate veſted in the mother and the children there born; and when the after-children were born, the eſtate opened and let them in. That an eſtate may open on a contingency, is no new thing; for in the caſe of *Pureſoy v. Rogers (b)*, THE CHIEF JUSTICE held, that true it is where an eſtate *in eſſe* and a contingent remainder with a remainder over to him who hath the firſt eſtate *in eſſe* are limited by one and the ſame conveyance (and here they are by the ſame will), there the remainder *in eſſe* ſhall veſt till the contingent remainder come *in eſſe*, and then the eſtates ſhall open and disjoin to let in the contingent remainder, becauſe they were all created by the ſame conveyance; and therefore the eſtates ſhall open and disjoin, as they are appointed by the original conveyance. As to the caſes that have been cited to prove it an eſtate tail in *Iſabella*, there is not any one caſe where the children were living at the time of making the will. MR. DENNISON has not put any one caſe where the limitation was to the deviſee and his children, and the children were living at the time of making the will; and this caſe turns on that; and to get over that diſtinction muſt overturn the reſolution in *Wild's Caſe*, which is expreſs, that where there are children living at the time of the deviſe, it cannot be an eſtate tail; and if the teſtator did intend it ſo, yet the law will ſupervene his intention. *Wild's Caſe* is expreſsly, that it cannot be an eſtate tail; and if it cannot be an eſtate tail, then I ſubmit it that it can operate in no other way but in the manner I have put it; and it muſt be conſidered as a joint

(a)

(b) 1. Eq Abr. 189. 2. Saund. 380. 2. Lev. 39. 3. Keb. 11.

eſtate

Oatze *againſt* Jackson.

eſtate in the mother and in the children; and the limitation to their heirs for ever makes it an eſtate in fee. This is the only point that I reſt it on; and the caſe in *Vernon* is an expreſs authority for me; and for theſe reaſons I ſubmit it, that the leſſor of the plaintiff hath no title.

Mr. Dennison *in his reply* ſaid, that he had always underſtood that the caſe of *Cooke v. Cooke* had been often denied on the other ſide THE HALL.

But Bootle, *Serjeant*, inſiſted, that it had been always allowed, and that it had been cited and relied on in the caſe of *Glenorchy v. Boſville* (a).

Lee, *Chief Juſtice*. This caſe appears to me to be a caſe of a good deal of difficulty upon the conſtruction of this will. The conſtruction Mr. Dennison puts on it, if the rules of law will admit it, ſeems to be that which beſt anſwers the intention of the teſtator; for undoubtedly he intended this eſtate as a proviſion for his wife, and after her death for *Iſabella* his daughter and her iſſue by *William Addingham*; conſequently, either of the conſtructions put upon the will by Mr. Dennison will anſwer that intention. On the other ſide, my Brother Bootle's conſtruction, grounded on the caſes that have been cited, does certainly defeat that intention; for by his conſtruction the eſtate muſt have been carried away from the children of *Iſabella* by *William Addingham* to the child ſhe hath had by a ſecond huſband. But however, if the authorities and rules of law require it, we muſt put this conſtruction on it. But if Mr. Dennison's conſtruction could be maintained on the foot of the reſolutions that have been cited, that would be the conſtruction that would beſt anſwer the intention of the teſtator, by giving *Iſabella* an eſtate tail; and by theſe latter words, “and to their heirs,” to confine them to ſuch heirs as are before mentioned, that is, “the heirs of “her body.” But certainly if an eſtate be given “to one and to “her children,” ſhe having children at that time, it will be a joint eſtate in the mother and her children, that is certain. What is there then to diſtinguiſh this from the preſent caſe? It appears there was only one child in being at the time of the deviſe. Take it then according to the caſe of *Cooke v. Cooke* (which there ſeems to be a good foundation for); taking it, that where there is a child in being at the time of the deviſe, and other children are born afterwards, that the children born after ſhall be admitted to take; that precedent ſhews, that under the deſcription of a deviſe “to “children,” not only children then in being, but alſo children born afterwards, muſt be conſidered as exiſting, becauſe the eſtate opens to let in theſe ſubſequent-born children; which ſeems to ſpeak ſtrongly; for that expreſſion of a deviſe to “children” imports the ſame thing as if all the children were born at the time of the deviſe. If lands be demiſed for life, the remainder to the right heirs of *J. S.* and of *J. H.* and *J. S.* hath iſſue and dieth, and afterwards

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(a) Caſes T. T. 3.

J.H. hath iſſue and dieth, the iſſues are not jointenants, becauſe the one moiety veſted at one time and the other moiety veſted at another time (*a*). SERJEANT BOOTLE ſays, that it was mentioned that they were jointenants; but whether that was on an accurate conſideration, will be a matter of further conſideration on a future argument. It may be alſo a matter of conſideration how repugnant this conſtruction is to what ſeems to be very ſtrongly the intention of the teſtator; and whether theſe words, "and to their heirs," may not in point of conſtruction be reſtrained to the children only, without carrying it to the mother as well as to the children; and if ſo, then ſhe will have an eſtate for life only. I do not mean to give any opinion; theſe are matters that appear to have difficulty in them; I mention them only that THE BAR may take notice of them hereafter.

WRIGHT, *Juſtice.* Though MR. DENNISON's conſtruction would beſt anſwer the intention of the teſtator, as the caſe now ſtands, becauſe it hath happened that *Elizabeth* the daughter is dead without making any alteration in the eſtate tail; yet taking it as it ſtood at the time of making the will, then the conſtruction MR. DENNISON contends for would put it in the power of the daughter to deprive the children of the eſtate. But taking it according to SERJEANT BOOTLE's conſtruction, that ſhe and the children took a joint eſtate in fee, then the teſtator did not give the mother the whole eſtate, but he gave the children an immediate proviſion, and never put it into the mother's power to defeat them of it; and it is merely by the accident of ſurvivorſhip that ſhe takes the whole eſtate. *Wild's Caſe* is extremely ſtrong; and as to the manner of their taking, I think the children take as jointenants; and I apprehend that the children are conſidered as if they were all *in eſſe* at the time of making the will. I would not be underſtood to give any opinion at all, but only to take notice, that though by accident MR. DENNISON's conſtruction will beſt anſwer the intention of the teſtator, yet it ſeems, at the time of making the will it would not better anſwer the intention than that other conſtruction.

LEE, *Chief Juſtice.* I remember *Co. Lit.* in the chapter of "*Jointenants*" ſtates, that where the perſons take by the ſame title, yet taking at different times, they ſhall not be jointenants, except in one caſe put of a feoffment made by a man to the uſe of himſelf and of ſuch wife as he ſhould afterwards marry for the term of their lives, and after he taketh a wife, in that one inſtance they are jointenants, and yet come to their eſtates at ſeveral times. This is a matter that I think deſerves further conſideration.

LEE, *Chief Juſtice*, in *Michaelmas Term*, in the ſixteenth year of *George the Second*, delivered the opinion of the Court in this caſe; and after having ſtated the caſe to the ſame effect as THE COUNSEL had done on the former arguments, he ſaid, The queſtion in this caſe for the conſideration of the Court is, What

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(*a*) Co. Lit. 188.

eſtate or eſtates paſs by the will of *R. Clayton* to *Iſabella* his daughter and to her children? The lands in queſtion are by the teſtator deviſed to his wife *Annabella* for and during the term of her natural life; and after her deceaſe to his daughter *Iſabella Addingham*, and to the children of her body begotten or to be begotten by *William Addingham*, and to their heirs for ever. It appears by this ſtate of the caſe, that at the time of making the will *Iſabella Addingham* had iſſue by *William Addingham* one daughter, called *Elizabeth*; and the queſtion is, What eſtate paſſed by the will to *Iſabella* the daughter, and to the children of her body begotten or to be begotten by *William Addingham?* On the former argument it was inſiſted on for the plaintiff, who claims as heir at law to the youngeſt daughter of *Iſabella*, that *Iſabella* took an eſtate for life only, and that the daughter took the remainder in fee under the deviſe to *Iſabella* and to her children begotten or to be begotten, and to their heirs. But as to this there is nothing in the will from which it can be inferred that this was the intention of the deviſor, but the contrary; becauſe in another part of the will, where he intended to give an eſtate for life only, he has given it in expreſs terms to his wife "for and during the term of her natural life;" but he hath not ſo expreſſed himſelf in that clauſe of the will in which he deviſeth his eſtate to his daughter. And as to this the caſe in *Co. Lit.* 9, ſeems to be very ſtrong: the words of the Book are, "*B.* having "divers ſons and daughters, *A.* giveth lands to *B. et liberis ſuis*, "and to their heirs;" the father and all his children take a fee-ſimple jointly, by force of theſe words "their heirs." But it was endeavoured to conſider this caſe in a different light, by reſtraining theſe words "and to their heirs" to the children only; and therefore it was ſaid, that only an eſtate for life was veſted in the mother, and that the fee was given to the children, becauſe the words "their heirs" were to be reſtrained and referred only to the children: but this is contrary to *Co. Litt.*; for according to the caſe above mentioned, they all take an eſtate in fee jointly. It is true, it is taken notice of in that caſe, *Co. Lit.* 9. that if he to whom the feoffment was there made had had no children at the time of the feoffment, the children born afterwards ſhould not have taken. But that obſervation will not affect the preſent caſe, becauſe it is ſtated that there was a child, and therefore ſuch child may take under the expreſſion of "children;" for ſo in the caſe of 2. *Ver.* 108. there the ſum of fifteen hundred pounds was deviſed to the children of *A.* who had only one child; and it was held, that a child ſhould take this money by this deſcription: and if this be ſo, then in this way of conſidering the caſe, by the deviſe "to "*Iſabella* and to her children begotten or to be begotten by *William* "*Addingham*" a fee paſſes to *Iſabella* and the child ſhe then had jointly, and conſequently *Iſabella* ſurviving that child had a fee in her; and as to the defendant, it is immaterial whether the children born after the teſtator's death can be let in to take or not, becauſe *Iſabella* ſurvived them alſo. Therefore here is a plain title in the defendant, as heir at law to *Iſabella*, in whom the fee veſted by ſurvivorſhip.

Judgment was accordingly given for the defendant.

Caſe 345*. Cheſton *againſt* Crawley.

A writ of enquiry, though executed by thirteen jurors, is good.

S. C. 2. Stra. 1159.

A WRIT OF ENQUIRY was executed by thirteen jurors. A motion was made to ſet the inquiſition aſide, on the ground that this number was illegal, a jury being confined to twelve perſons only.

FORD oppoſed this motion, and cited the caſe of *Finch v. King (a)*, where an enquiry was executed by thirteen jurors, and held good on a writ of error.

THE COURT, after conſideration, held that the writ was well executed, for that ſuch a writ may be executed by any number of jurors more, though not leſs, than twelve, for it is only an inqueſt of office (*b*).

(*a*) 2. Roll. Abr. 673.

(*b*) See Cook *v.* Beale, 1. Ld. Ray. 176. Beardmore *v.* Carrington, 2. Wilſ. 248. Eichorer *v.* Le Maitre, 2. Wilſ. 368. Hewit *v.* Mantel, 2. Wilſ. 374. Bruce *v.* Rawlings, 3. Wilſ. 62. See alſo 1. Tidd's Practice, 314.

MICHAELMAS TERM,

The Sixteenth of George the Second,

IN

The Common Pleas.

Sir John Willes, *Knt. Chief Juſtice.*

Sir William Forteſcue, *Knt.* *Sir* Thomas Parker, *Knt.* *Sir* Thomas Burnett, *Knt.*	*Juſtices.*

Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Fiſher *againſt* Kitchenman.

Caſe 346.

ACTION ON THE CASE on a ſpecial agreement, which was, "that whereas a ſuit was then depending concerning *a cock-match* between the plaintiff and one *A.* the defendant agreed to pay the plaintiff the fifth part of the expences "of ſuch ſuit."

The *poſtea* and *niſi prius roll* ſufficient evidence to prove that a cauſe came down to be tried, and that a juror was withdrawn.

S. C. 2. Barnes, 230. 355.

The declaration having ſet forth the nature of the agreement, takes notice briefly, that an action had been depending between *A.* and the plaintiff concerning this cock-match, and that ſuch proceedings were had thereon that iſſue was joined; that the cauſe came down to be tried at the aſſizes; that a juror was withdrawn, and the cauſe referred to arbitration by conſent of parties: then the plaintiff avers that he expended in the proſecution of the ſuit two hundred and fifty pounds, of which the defendant's part amounted to fifty pounds, but that he refuſed to pay it to the plaintiff *prout* agreement, *per quod, &c.* The defendant pleaded that he made no ſuch promiſe, on which the parties were at iſſue.

Fisher *againſt* Kitchenman.

The plaintiff, after proving the agreement, in order to prove the proſecution of the ſuit between him and *A.* that it came down to be tried at the aſſizes, and that a juror was withdrawn, and the matter referred to arbitration, produced in evidence the *niſi prius* roll, and the *poſtea* indorſed on it by the aſſociate, who ſwore that it had not been out of his cuſtody ſince the trial.

The defendant objected, that this was no good evidence of the proceedings in the former action, and that a copy of the proceedings which were recorded on the rolls of the court ought to have been produced.

Mr. Justice Burnett, who made this report and tried the cauſe, ſaid, he was of opinion that as the *niſi prius* roll was ſigned and ſealed by the treaſurer, who by his office was the proper perſon for it, and was by law intruſted with the ſeal of the Chief Juſtice, it was a ſufficient evidence of the original record and proceedings in this court as to this point, and therefore admitted it to be read, but that he reſerved the point for the opinion of the Court.

Bootle, *Serjeant, for the plaintiff,* cited the caſe of *The King v. Eyles,* before Hardwicke, *Chief Juſtice,* in the fourth year of *George the Second,* where, in an indictment for perjury, the indictment ſet forth that there was a cauſe depending between *A.* and *B.* and that ſuch proceedings were had that iſſue was joined, and the cauſe came down to be tried, &c. to prove which the record of *niſi prius* and the *poſtea* were admitted as good evidence, and ſaid that ſuch proof was always allowed of in ſuch indictments.

Willes, *Chief Juſtice.* It is admitted by the agreement that there was a ſuit commenced and then depending; the only thing to be proved was the ſubſequent proceedings in this court, that the cauſe came down to be tried at the aſſizes, and that a juror was withdrawn. To be ſure in many caſes the *poſtea* is not evidence of a verdict and judgment; for wherever it is neceſſary to give a verdict or judgment in evidence, as on ejectment, &c. there it muſt be entered on record, and a copy of that record muſt be produced, examined from the records of this court; for after the return of the *poſtea,* the verdict or judgment might have been ſet aſide. Here the ſingle fact to be proved is, that the cauſe came down to be tried and that the juror was withdrawn; and I think the *poſtea* and *niſi prius* roll ſufficient evidence to prove this, as in an indictment for perjury. So if a wager was depending whether a cauſe was tried and a verdict given in it, to prove theſe facts the *poſtea* might be good evidence.

Parker, *Juſtice,* of the ſame opinion.

Held good evidence by the whole Court.

Goodridge *againſt* Goodridge. Caſe 347.

On a deviſe to *A.* for life, "and "if my ſon *Richard* ſhall "happen to die "without *heirs*, "then my ſon "*John* ſhall enjoy my lands," the word *heirs* means *heirs of the body*.

WILLES, *Chief Juſtice*, delivered the opinion of THE COURT:—This comes before the Court on a caſe made at the aſſizes, which was thus: *John Goodridge* being ſeiſed in fee of the premiſes in queſtion, and having two ſons *Richard* and *John*, deviſed them in this manner: he firſt deviſed the lands in queſtion to his wife for life, and then ſays, "And my will is, that if my "ſon *Richard* ſhall happen to die without heirs, then my ſon "*John* ſhall enjoy my lands." The teſtator's wife died; and *Richard* entered and died without iſſue, and without ſuffering a recovery, but in his life-time deviſed the premiſes to his wife. *John*, the ſecond ſon, brought an ejectment, and is leſſor of the plaintiff.

The queſtion on this caſe is, Whether *Richard*, the eldeſt ſon, was tenant in tail or in fee? If he was only tenant in tail, then his brother *John* has a right to the premiſes, *Richard* not having ſuffered a recovery; if he was tenant in fee, then it will be for the defendant, who is his deviſee.

There are TWO POINTS to be conſidered:

FIRST, What conſtruction the word "heirs" has in this will, whether it means "heirs in fee," or "heirs of the body?" If the word "heirs" paſſes an eſtate in fee to *Richard*, then the remainder over to *John* is void, for after a fee no eſtate can be further limited. If it means "heirs of his body," then a farther queſtion is made.

SECONDLY, Whether it can paſs an eſtate-tail to *Richard* in the preſent caſe, there being no precedent eſtate given to him to ſupport it?

As to THE FIRST QUESTION, we are all of opinion that the word "heirs" muſt mean "heirs of his body;" for as long as *John* is living, *Richard* cannot poſſibly die without heirs, therefore it would be abſurd to put any other conſtruction on the word. And this diſtinction has always been allowed, except in *Cro. Car.* 57. but many caſes have been determined ſince on this foundation, and always contrary to this caſe; as in *Cro. Jac.* 415. deviſe "to his "ſon, and if my three daughters outlive their brother and his heirs, "remainder over;" held that "heirs" here muſt mean heirs of his body. *Cro. Jac.* 695. deviſe of "*Black Acre* to *A.* and his heirs for ever, "and of *White Acre* to *B.* and his heirs for ever, and that the ſurvi"vor of them ſhould be heir to the other, if either of them die without "iſſue;" held that though the firſt words paſſed a fee, yet the ſubſequent words controuled them, and paſſed an eſtate in tail. 3. *Lev.* 70. deviſe "to *A.* for his life and to his heirs, and for want "of heirs of him to *B.* and his heirs;" held that *A.* had an eſtate-tail, for "heirs" means heirs of his body. 3. *Mod.* 123. deviſe "to "his eldeſt ſon, and if he die without heirs male to his ſecond ſon;" held it paſſed an eſtate-tail to the eldeſt, though the word "body" was wanting. *Salk.* 223. *H.* had three ſons, *A. B.* and *C.* and deviſed his lands to *B.* his ſecond ſon, after the death of his wife, to hold to him and his heirs for ever, and for want of ſuch heirs then to his own right heirs; held that *B.* the ſecond ſon, had only an eſtate-tail; and the word "heirs" can import nothing more than iſſue, for *B.* could not die without heirs, living heirs of the father; but if the deviſe over had been to a ſtranger, *B.* would have had a fee. Thus the diſtinction has been long ſettled, that if the ſecond deviſee may be heir to the firſt, the word "heirs," where there is afterwards a limitation over, muſt mean heirs of the body, and not heirs in fee; for whilſt the ſecond deviſee is living, the firſt cannot want heirs general. But where the ſecond deviſee is a mere ſtranger to the firſt, and cannot be heir to him, there theſe ſame words paſs a fee to the firſt deviſee. This was ſo held in the latter end of the reign of *Queen Anne*(*a*), and grounded on *Dyer*, 33. deviſe of lands to his daughter for life, remainder to *A. L.* and his heirs, and for default of ſuch heirs remainder over to a ſtranger; held that theſe words paſſed an eſtate in fee to *A. L.*; but if the remainder had been given to any one that might have been heir to him, it would have been an eſtate-tail, for then he could not have died without an heir, and ſo a remainder might properly be.

A deviſe "to *A.* "for life, and if "my ſon *Richard* die "without heirs, "then my ſon "*John* ſhall enjoy my land," paſſes an *eſtate in tail* to *Richard* by implication.

Secondly, Taking it then that the words here mean "heirs of the body," it is inſiſted, as a diſtinction to this caſe, that in all the caſes cited an expreſs eſtate was before given to the firſt deviſee, ſo that the word "heirs" had in thoſe caſes a relation to the precedent words; but in this caſe, as no eſtate is before given to *Richard*, he takes a fee by deſcent, and then this implication cannot take it from him. But I think this diſtinction has no foundation in reaſon or in law: in reaſon it has none; for why ſhould it be thought the teſtator intended to give his ſon a greater eſtate by the word "heirs," where nothing is before given to him, which is the preſent caſe, than where he before deviſes an expreſs eſtate to him? ſo neither has it any foundation in law. To prove the diſtinction the defendant cited 8. *Co.* 155. *b.* that if a feoffment be made to one and his heirs, there can be no averment of the intent of the party that the feoffee ſhall have but an eſtate to him and the heirs of his body; but that is nothing to the preſent caſe. *Clath's Caſe*, *Dyer*, 330. *b. Vaugh.* 267. but this caſe is no more than that the words, "if his two daughters died without "iſſue of their bodies," did not create by implication croſs remainders in tail to the deviſor's daughters, whereby the eldeſt ſhould take the part of the youngeſt, but that her part ſhould go to the heirs at law. An heir at law is not to be diſinherited by a poſſible or probable implication (*b*); but this is more, for it is a neceſſary implication.

( ) 11. Mod 207.

(*b*) Vaughan, 257.

implication. In *Moor*, 644. here was an expreſs deviſe to the eldeſt ſon and his heirs, and then there is a deviſe to the three youngeſt children in caſe the eldeſt ſon did not pay them twenty pounds each; and held that it was a good deviſe to the youngeſt on failure of payment by the eldeſt, though a fee was veſted. *Cro. Eliz.* 525. *Moor*, 422. This is not applicable to the preſent caſe, for it depends on the conſtruction of the word "or." As to *Scrape v. Rodes*, that was on ſo obſcure a will, that none was ever penned like it before nor, in all probability, ever will again, and can be no authority in any caſe. Thus much as to the caſes cited by the defendant's Counſel; and though the plaintiffs have cited no caſe exactly in point with the preſent caſe, yet ſeveral have been cited to prove that the heir's eſtate may be turned to an eſtate-tail by implication. In *Owen*, 29. the teſtator having three ſons deviſed lands in theſe words: "That if it ſhall pleaſe God to "take to his mercy my ſon *Richard* before he ſhall have iſſue of his "body, ſo that my lands ſhall deſcend to my ſon *George*, then, &c." and the queſtion was, Whether *Richard*, who was yet living, had an eſtate in tail by theſe words? and all the Juſtices agreed, that it was a plain implication to make an eſtate-tail in *Richard*, 13. *Hen.* 7. 17. *Vaugh.* 259. is in point for the plaintiff, for here was no precedent deviſe to the heir: It was held here that the heir was not diſinherited by the implication, becauſe it was only a poſſible or probable one; but it was agreed that if it had been a neceſſary implication, as it is in this caſe, it had been otherwiſe. If a deviſe be made of a houſe to the heir at law after the death of his wife, the wife ſhall have the houſe for her life by implication, the heir at law being expreſsly excluded. I do not rely on *Bensford's Caſe (a)*, for that was on a feoffment to uſes, and a very nice determination, and could not have been ſo determined by turning the word "*of*" into "*de*" in *Latin*. The rule for conſtruction in the caſe of a will in order to diſinherit an heir at law by implication, is, that the words muſt have a clear and apparent intent, and muſt not be ambiguous or any way doubtful. Lord Vaughan's rule, in the caſe of *Gardner v. Shelden*, is rather carried too far, and is, in general, too ſtrong; yet, ſtrong as it is, this caſe is within the conſtruction of it: he ſays that an heir is not to be diſinherited by a conſtructive or poſſible, but only by a neceſſary implication; and that a neceſſary implication is where the words can admit of no other conſtruction; and I think the words in this will are within that deſcription, and that the conſtruction here made of the word "heirs" to mean "heirs of the body," ariſes from a neceſſary implication, ſince *Richard* cannot poſſibly die without heirs general as long as *John* is living. The words, therefore, muſt have the ſame conſtruction as if he had ſaid, "If my ſon "*Richard* die without heirs of his body, then my ſon *John* ſhall "enjoy my lands," and will admit of no other.

The leſſor of the plaintiff muſt have the *poſtea*.

(a) 7. Co. 41.

Caſe 348. Dabble, on the Demiſe of Jones, *againſt* Elſtol.

Whether a deed was in fact executed, is proper for a jury to determine.

IN AN EJECTMENT for ſeveral lands in *Hampſhire*, the plaintiff proved his title as heir at law to *Mrs. Moore*, who was laſt ſeiſed. The defendant claimed part of the premiſes under a deed-poll from the ſaid *Mrs. Moore*, by which in her life-time ſhe gave ſome particular eſtates, there mentioned, to one *Mr. Samuel Willis*, under whom the defendant claimed. The defendant proved the execution of the deed-poll by *Mrs. Moore*, but ſaid he believed it was not read over to her. Another witneſs proved, that *Mrs. Moore* ſaid that *Mr. Willis* was her particular friend, and ſhe wiſhed that ſhe had more to give him. No conſideration appeared to have been given by *Willis*, nor was he any relation to *Mrs. Moore*; but the plaintiff was her own daughter.

Upon this evidence THE JUDGE left it to the jury to determine whether they believed the evidence in favour of the defendant; and left them to conſider whether they believed the deed was well executed by *Mrs. Moore*, and whether it was according to her intention. The jury brought in a general verdict for the plaintiff.

The defendant now moved to ſet aſide the verdict, as being given contrary to evidence.

GAPPER. It is admitted that the defendant only claims part of the premiſes by virtue of this deed-poll, and that as to the other part the plaintiff has a clear title; this being ſo, the verdict cannot be ſet aſide, though the Court ſhould think it contrary to evidence; and he cited a caſe in *Michaelmas Term*, in the ſeventh year of *George the Second*, in the common pleas, where two iſſues were tried, and a verdict for the plaintiff in both, but one of them appeared to be againſt evidence, yet, as one of the iſſues was admitted to be right, the Court would not grant a new trial, for they muſt ſet aſide both or none.

THE COURT all held that this rule had no foundation in law; for if the Court be of opinion that a verdict is againſt evidence, they will ſet it aſide, though for part of it the verdict was right.

PARKER, *Juſtice*, made a difference, that where the action is brought againſt ſeveral defendants, and for ſome of them a verdict is given rightly, but for others wrongfully, ſuch verdict cannot be ſet aſide.

THEY ALL HELD, as to the principal queſtion, that it was matter very proper to be left to the jury on the credibility of the evidence and the circumſtances attending it; and as they have given a verdict for the plaintiff, the Court ought not to ſet it aſide as againſt evidence, for the jury are the proper judges.

The defendant's motion was denied.

Duckworth, on the Demiſe of Tubly, *againſt* Tunſtall. Caſe 349.

THE PLAINTIFF being both executor and deviſee of *A.* ſerved the defendant with an ejectment, on the 4. *Geo.* 2. c. 28. for non-payment of rent, thirty-nine pounds of which was due to the plaintiff himſelf as deviſee in his own time, and the reſt was due in the teſtator's life-time, which the plaintiff alſo claimed as executor.

A perſon, who is both executor and deviſee, cannot join debts due to him in thoſe characters reſpectively, in the ſame declaration.

The defendant moved to pay thirty-nine pounds into court, and to ſtay proceedings, &c. on the fourth ſection of the ſaid act, which he inſiſted was all the plaintiff, by his own ſhowing, had a right to recover on the ejectment, and that for the reſt he ought to bring an action.

S. C. 2. Barnes, 150.

The plaintiff refuſed to accept it unleſs the whole rent due was paid, as well what accrued in the teſtator's life-time as what became due ſince his death, as he was executor as well as deviſee.

THE COURT all held, that the plaintiff was intitled to recover no more rent on this ejectment than was due to him as deviſee ſince the teſtator's death, and that for the reſidue, which was due in the teſtator's life time, he muſt bring an action as executor. They compared it to a mortgagor, who brings a bill to redeem on payment of the mortgage-money, &c. the Court will not oblige him to pay other debts which he may have contracted with the mortgagee on bond, &c. unleſs ſuch debts are particularly charged on the premiſes, but for theſe the mortgagee muſt bring his action. But if the perſon who comes to redeem be heir at law to the mortgagor, ſo that the ſecurities would be *a lien* on the eſtate, he ſhall in that caſe be obliged to pay them before he is permitted to redeem. 2. *Chan. Rep.* 316.

The proceedings were ſtayed.

Goodwright, on the Demiſe of Griffin, *againſt* Fawſon. Caſe 350.

EJECTMENT brought for one meſſuage "ſituate, lying, and "being in *Coventry*, in the pariſhes of *Saint John the Baptiſt* "and *Saint Michael*, or one of them."

The uncertainty of a declaration in ejectment "for lands lying "in the pariſhes "of *A.* and *B.* "*or one of them*" is not cured by the verdict.

The plaintiff had a verdict.

The defendant moves in arreſt of judgment, for that the ejectment is quite uncertain, for the words "or one of them" does not relate to either of the pariſhes in particular; and the defendant can neither know what to plead, nor the ſheriff how to give poſſeſſion.

S. C. 2. Barnes, 150.

The plaintiff inſiſted, that ſince the ſtatute for amendment of the law, as the *venue* is to come from the body of the county, it would have been ſufficient to have laid it in *Coventry* generally.

The caſes cited were *Cro. Jac.* 124. 307. 2. *Roll. Abr. tit.* "*Trial*" 622, 623. *ſ.* 37. 39. 6. *Co.* 74. *Carth.* 204.

ALL THE COURT held, that it was laid too uncertain, and that the words "or one of them" could not be rejected.

The judgment was arreſted.

Caſe 351.

Ratcliffe *againſt* Goodcheap.

On what *affidavit* a defendant may be held to bail in an action on a *bottomree-bond.*

2. Bulſt. 54.
6. Mod. 38.
1. Lev. 260.
2. Stra. 1190.
2. Burr. 747.
1. Show. 14.
1. Stra. 476.
4. Bac. Abr. 673.

ACTION OF DEBT on a bottomree-bond. The plaintiff made an affidavit that the defendant was indebted to him in ſo much money as appears by the bond, and ſays further that the ſhip on which the bond was given was not loſt by unavoidable accident, but for want of care, as he, the ſaid plaintiff, has been informed and verily believes.

The defendant made an affidavit that all proper care was taken of the ſhip, and that it was loſt by ſtorms and unavoidably, or to that effect.

On the part of the plaintiff an affidavit was made by one *John Deane*, who was a ſailor on board, wherein he ſwore poſitively that the ſhip was loſt for want of proper care, and if the captain and mariners had not deſerted her, ſhe might have gone on ſafely on her voyage.

The queſtion was, Whether on theſe affidavits the defendant ought to be held to bail?

WILLES, *Chief Juſtice.* There muſt be a probable cauſe ſhewn to hold a defendant to bail. The general rule is, that there muſt be a poſitive affidavit, and where that can be had, the Court requires it. But to this rule there are exceptions, for if from the nature of the demand a poſitive affidavit cannot be had, the Court will diſpenſe with it, and admit the beſt and moſt certain which can be got. As *an executor* cannot make a poſitive affidavit of the debt becauſe it was contracted with another perſon, and therefore it is not required; ſo on bottomree bonds poſitive affidavits are not expected, and therefore the plaintiff ſwears only to his information and belief. In the caſe of *Munning v. Williams* (*a*), lately in this court, the reaſon why the Court refuſed to let the defendant be held to ſpecial bail, was not on account of the plaintiff's affidavit being deficient, but becauſe the defendant ſwore poſitively that the ſhip was unavoidably loſt, and therefore, as the plaintiff had in that caſe no poſitive affidavit to counterbalance the defendant's, there being nothing but the plaintiff's own affidavit in the uſual form, to his information and belief, we did not hold the defendant to bail. But here is the poſitive affidavit of *John Deane* for the plaintiff, which anſwers the defendant's poſitive one; and wherever there is one poſitive affidavit for the plaintiff, though there are ſeveral as poſitive for the defendant, yet he ſhall be held to ſpecial bail.

BURNETT, *Juſtice*, was of the ſame opinion.

The rule for a common appearance was diſcharged.

(*a*) 2. Barnes, 58.

TRINITY TERM,

The Sixteenth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt, Chief Juſtice.*
Sir William Chapple, *Knt.* }
Martin Wright, *Eſq.* } *Juſtices.*
Thomas Denniſon, *Eſq.* }
Sir Dudley Ryder, *Knt. Attorney General.*
The Hon. William Murray, *Solicitor General.*

Boſworth *againſt* Budgen.

Caſe 352.

The cuſtom of *London* not to employ a *foreigner* in any *manual occupation* within the city, is good.

S. C. 2. Stra. 1112.

ON a ſpecial return to a *habeas corpus* it appeared, that there is a cuſtom in the city of *London*, and a by-law made in purſuance of it, "that no freeman of the city of *London* "ſhall ſet to work any perſon, being a foreigner to the freedom "of the city, in any manual occupation whatſoever, within the "city of *London* or the liberties thereof, under the penalty of "five pounds."

An action was brought againſt the defendant, being a freeman of *London*, for employing a foreigner not free of the city to work for him as *a currier*, well knowing the by-law and having notice of it.

The defendant took ſeveral exceptions to the by-law and cuſtom to ſhew that they were unreaſonable and void.

Lee, *Chief Juſtice*, delivered the opinion of the Court. Several exceptions have been taken:

First, For that it excludes all perſons who are not actually free, and that there ought to be a ſaving for ſuch as are entitled to their freedom, though they have not taken it up.

SECONDLY,

Bosworth *againſt* Budgen.

Secondly, That the by-law and cuſtom forbid the ſetting to work in any manual occupation generally; and it ought to be in any manual occupation for hire, gain, or ſale.

Thirdly, That the cuſtom is laid to be within the city only, but the by-law is within the city and liberty of the city.

Fourthly, This reſtrains a freeman from employing any but freemen, whereas it may happen that a ſufficient number of freemen cannot be had, or the freemen may refuſe to work, which will then be a reſtraint on trade for want of hands to carry it on.

As to THE FIRST EXCEPTION, the reſolution of the Court in *Waggoner's Caſe (a)* is a full anſwer to it; for there the cuſtom as ſet forth in the pleading, for it did not appear on the return, was, that no perſon not being free ſhould keep an open ſhop, &c. and there was no ſaving of perſons entitled to their freedom, which is a reſolution in point as to this objection; for it was as ſtrong an objection in that caſe, though indeed the cuſtom was not applicable to this.

As to THE SECOND OBJECTION, the reaſon made uſe of in *Waggoner's Caſe* is an anſwer to that alſo, for it is againſt uſing a trade, occupation, or handicraft for hire, gain, or ſale. It was objected, though it was averred that *Waggoner* uſed the occupation of a tallow-chandler, yet it was not averred that he ſold any candles, and ſo he might make them for his own uſe; but it was held that by uſing a manual occupation, it muſt be underſtood that he followed a trade; for it could not be ſaid to be uſing a manual occupation when he worked only for his own uſe, but muſt imply a ſale for profit.

As to THE THIRD EXCEPTION, upon this return we muſt take "the city" and "liberty of the city" to be the ſame, unleſs the contrary appears. *Cart.* 122.

As to THE FOURTH EXCEPTION, if this was to take place, it would deſtroy ſeveral by-laws which have been adjudged good; as that to reſtrain the number of carts, 4. *Mod.* 228. that none ſhould unload coals from carts but particular perſons, 3. *Mod.* 193. and the caſe of *Fazakerly v. Wiltſhire*, *Trinity Term*, in the ſeventh year of *George the Firſt*. In theſe caſes the ſame objection was taken as has been done here, but yet the by-laws were held good; and the truth and reaſon of thoſe caſes was, that the by-laws have the appearance of reſtraining trade, yet when they are founded on a cuſtom which is the law of the place, they have been conſidered as regulations proper for the place where the trade is uſed. If, therefore, a cuſtom reſtraining one from uſing a trade but under certain regulations be good, which is *Waggoner's Caſe*, it ſeems *à fortiori* that a by-law founded on a cuſtom reſtraining a man from employing others but under regulations, ſhould be good alſo. In *Hard.* 56. it is recited, that this by-law was held good; and the Book ſays, though intended to abridge trade and the liberty of the ſubject, yet being for the good and better government of trade in general, it was allowable.

(a) 8. Co. 124.

Another objection was to the action being brought in the name of the chamberlain, for it was ſaid the city would by that means be both judge and party. But it was held that the chamberlain was the proper perſon to bring the action. 5. *Co.* 63. 1. *Roll. Abr.* 366. *Moor*, 403.

The Court held that the cuſtom and by-law was good (*a*), and *a procedendo* was granted.

(a) See Fazakerly v. Wiltſhire, 5. Com. Dig. 14. Robinſon v. Well, 1. Stra. 462. and 6. Com. Dig. "Trade" (D. 2.). 2. Com. Dig. "By-Law" (C. 2.) (C. 3.).

Read, Aſſignee of Lingood, *againſt* Vaughan. Caſe 353.

An aſſignee may *affirm* or *diſaffirm* the contract of the bankrupt.

THIS was an action of *aſſumpſit* for money had and received to and for the uſe of *Read* the aſſignee.

Bootle moved in arreſt of judgment, that if the receipt of the money was wrongful, the action ought not to have been an action of *aſſumpſit* on the contract, but an action of trover on the *tort*.

Lee, *Chief Juſtice.* An aſſignee may either affirm the act of the bankrupt, or may diſaffirm it, and make it a *tort* or nullity.

Chapple, *Juſtice.* If the aſſignee employed the defendant to get in the money of the bankrupt, this is money had and received to the plaintiff's uſe.

Judgment was given for the plaintiff.

Cary *againſt* Jefferſon. Caſe 354.

A *ſcire facias* againſt bail cannot be amended.

THIS was a motion to amend the firſt *ſcire facias* againſt bail, after a plea of *nul tiel record* to the ſecond.

Lee, *Chief Juſtice.* In the caſe of *Hilliard v. Froſt*, in the ſeventh year of *George the Firſt*, the Court refuſed to amend a *ſcire facias* againſt bail.

The Court. Let the rule to ſhew cauſe be diſcharged, for the writ cannot be amended. The party may diſcharge the writ and bring another, and then the principal may be ſurrendered.

Caſe 355. Plumbe *againſt* Marſon.

In what caſe the Court will make a plaintiff, being *a foreigner*, give ſecurity for coſts.

FORD moved to ſtay proceedings againſt the defendant until the plaintiff ſhould give his ſecurity to pay coſts.

The action was for goods ſold and delivered. The ground of the motion was, that the plaintiff was a foreigner reſident at *Stockholm*, the metropolis of *Sweden*.

1. Stra. 694. 497. B. N. P. 111. 2. Stra. 932. 1206. 1. Wilſ. 130.

But THE COURT refuſed to grant the motion, alledging that it was never done except in an action of *ejectment*, where the leſſor of the plaintiff is an infant (*a*).

1. Term Rep. 491.

(*a*) But the Court will now alſo ſtay the proceedings, where the plaintiff is a *foreigner*, reſiding abroad, or reſides either in *Scotland* or in *Ireland*, until he give ſecurity for the coſts. Birchman *v.* Wright, Bull. N. P. 111. Lucas *v.* Fulwood, 3. Burr. 1177. Pray *v.* Edie, 1. Term Rep. 267. Fitzgerald *v.* Whitmore, 1. Term Rep. 362. But there is a difference in the practice of the courts of king's bench and common pleas upon this ſubject. De La Preuve *v.* Biron, 4. Term Rep. 697. Parquet *v.* Eling, 1 H. Bl. Rep. 106.

TRINITY TERM,

The Seventeenth and Eighteenth of George the Second,

IN

The Common Pleas.

Sir John Willes, *Knt. Chief Juſtice.*
Sir William Forteſcue, *Knt.* } *Juſtices.*
Sir Thomas Burnett, *Knt.* } *Juſtices.*
Sir Thomas Abney, *Knt.* } *Juſtices.*
Sir Dudley Ryder, *Knt. Attorney General.*
The Hon. William Murray, *Solicitor General.*

Pilgrim *againſt* Kinder,

Caſe 356.

A promiſſory note given by a plaintiff to a defendant before an original ſued out, but not due till afterwards, cannot be pleaded as *a ſet off* in bar of the plaintiff's action, but muſt be pleaded *puis darrein continuance.*

THIS was an action upon the caſe, wherein the plaintiff declared, in *Michaelmas Term* laſt, upon five ſeveral promiſes, and laid each count (*a*) for ten pounds, and his cauſe of action on each on the firſt day of *September* laſt, and concluded his declaration to his damage of twenty pounds, by reaſon of the defendant's breach of the ſaid promiſes, The plaintiff, before ſuing out his original, had given a promiſſory note to the defendant for eight pounds, payable within one month after *Michaelmas*.

The defendant imparled till after the note became payable, and then pleaded a ſet off in bar, " That the plaintiff ought not to have " his action againſt the defendant, becauſe the plaintiff, on the " twenty-fourth of *Auguſt*, before the day of his obtaining his " original writ, made his note, and thereby promiſed to pay to

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(*a*) The five counts in the declaration were theſe: The firſt, an *indebitatus aſſumpſit* for goods ſold and delivered to the defendant on the firſt of *September* laſt. The ſecond, a *quantum valebant* for other goods ſold on the ſaid firſt of *September*. The third, an *indebitatus aſſumpſit* for work and labour on the ſaid firſt of *September*. The fourth, a *quantum meruit* for other work and labour on the ſaid firſt of *September*. And the fifth, an *indebitatus aſſumpſit* for money laid out and expended on the ſaid day. *MS.*

Pilgrim *againſt* **Kinder.**

" the defendant the ſum of eight pounds one month after *Michael-*
" *mas* then next enſuing, which note remains unſatisfied, and the
" money thereupon, which is now due and payable to the defen-
" dant, exceeds the money due from him to the plaintiff on the
" promiſes in the declaration; and this he is ready to verify;
" therefore prays judgment whether the plaintiff ought to have
" his action againſt him."

The plaintiff replied, That he ſued out his original on the twenty-ſecond of *June* laſt (which is before the time laid of his cauſe of action in his declaration), and traverſes his giving the note before that time; *et hoc paratus eſt verificare*; and therefore prays judgment and his damages.

The defendant rejoined, that no ſuch writ was ever ſued forth as in the replication is mentioned; *et hoc paratus eſt verificare*; wherefore he prays judgment, if the plaintiff ought to have his action againſt him.

To this the plaintiff demurred generally, and the defendant joined in demurrer.

Serjeant Belfield *for the plaintiff*. Both the plea and the rejoinder are ill. The plea is liable to theſe objections: First, the matter in the plea is not pleadable upon the ſtatutes of Set-off. Secondly, admitting ſuch matter to be pleadable within the ſtatutes of Set-off, yet it is not in the preſent caſe pleadable in bar by *actio non*, but ought to have been pleaded *puis darrein continuance*; the note pleaded not becoming due until after a continuance, by the defendant's imparling. Thirdly, ſuppoſe this matter may be pleaded by *actio non*, yet it is badly pleaded; for it does not fully and completely deny any of the counts in the declaration, and tenders a matter too complex to take iſſue upon.

The first objection. This promiſſory note is not pleadable by virtue of any of the ſtatutes of Set-off, becauſe the note was not payable until long after the action brought. No action can be brought on ſuch note till the day of payment. A note does not come under the rule of *debitum in præſenti ſolvendum in futuro*; for a note payable at a future day is no debt till the day of payment, though the law is otherwiſe of a bond. This diſtinction was ſettled in the caſe of *Sparke v. Tuky* (*a*). The ſtatutes of Set-off were to prevent circuity of action, by permitting one debt to be ſet againſt another, which could not be ſo at law. A plea of ſet-off by a defendant under thoſe ſtatutes is in the nature of a declaration againſt the plaintiff, and it muſt be of ſuch a debt for which he could declare, if he brought a diſtinct action; but it is plain he could not have declared upon this note, becauſe the day of its payment was not arrived. The defendant ought to have paid this demand to the plaintiff, that he might have his

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(*a*) 2. Eq. Abr. 105. 2. Stra. 867. 2. Ld. Ray. 1546. 1. Bar. K.B. 59. 67. 79.

advantage of it in the mean time, otherwiſe his defence falls upon this abſurdity, “ I owe you money for which you have ſued me, and “ I won't pay you, becauſe hereafter you will become indebted to “ me.”

THE SECOND OBJECTION to the plea is, That admitting ſuch note as the preſent to be pleaded by way of ſet-off, yet it is not pleadable in bar by *actio non*, but ought to have been pleaded *puis darrein continuance*, becauſe the note did not become a debt or payable until after the defendant had continued the cauſe by imparling. The plea of *actio non*, or in bar, and the plea of the very ſame matter *puis darrein continuance*, have different conſequences with regard to the plaintiff. For where, after a continuance of the cauſe, any matter ariſes ſubſequent in time to the declaration, and before the plea the defendant may plead ſuch matter ſpecially, as that ſince the laſt continuance ſuch a fact happened as the note became payable, &c. and then the plaintiff may confeſs it, and judgment thereupon will be, that the defendant *eat inde ſine die*, and the plaintiff ſhall pay no coſts, nor be amerced, becauſe he had a ground or good cauſe of action at the time of bringing his writ and declaring, and the defendant's plea is only an excuſe; whereas, if the matter is not pleaded *puis darrein continuance*, and judgment goes for the defendant, the plaintiff ſhall be amerced for his unjuſt ſuit, and ſhall alſo pay coſts.

THE THIRD OBJECTION to the plea is, That ſuppoſing this note needs not to be pleaded *puis darrein continuance*, but may be pleaded by *actionem non*, or in bar, yet it is even then badly pleaded. FIRST, as it does not anſwer any count in the declaration fully and compleatly, as it ought to be done; and, SECONDLY, as it tenders matter too complicated to form an iſſue upon. In the firſt place, it is no compleat anſwer, for it does not fully and properly deny any one of the five counts. The firſt count is an *indebitatus aſſumpſit* for goods ſold and delivered for ten pounds, which is abſurd and improper: for the plaintiff's charge of ten pounds in this count muſt be preſumed to be the real ſum due, till denied by the defendant's plea, or found to be otherwiſe by a jury. The defendant ought not to have pleaded ſo abſurdly, but ſhould have anſwered the whole demand of ten pounds laid in the *indebitatus aſſumpſit*, by pleading *non aſſumpſit* as to two pounds, and the note (if pleadable at all) to the remaining eight pounds. And as to the count upon the *quantum meruit*, if the defendant would have pleaded a tender of eight pounds to a demand of ten pounds, he muſt have averred that the goods were worth no more than the money tendered. In the laſt place, the plea is not iſſuable; firſt, as it is an abſurdity to try whether eight pounds exceeds ten pounds; or ſecondly, if it may be reduced to a certain point by verdict: yet to do that, the jury muſt ſtate an account in a long intricate affair; they muſt firſt ſtate the plaintiff's account, and then the defendant's, and then ſee what the balance is: this would be carrying the thing farther than even the action of account, the proper buſineſs of which is to adjuſt accounts; for even there neither the Judge or the jury take the account, but the Court gives judgment againſt the defendant *quòd computet*, and auditors are aſſigned to take the account, and the Court never does it itſelf.

Besides, the rejoinder is bad; the plaintiff has replied an original of the twenty-ſecond of *June*, which preſuppoſes it to be returned and filed, and made a record in order to give the Court a juriſdiction. The defendant has rejoined to this, no ſuch original, and concludes with an *et hoc paratus eſt verificare*; which averment is wrong, for the original is a record, and not triable by the country. The defendant in his rejoinder ſhould have taken iſſue upon it, and concluded to the country, *et hoc petit quòd inquiratur per patriam*. There was a plain affirmative and negative upon which iſſue ought to have been joined, but inſtead of doing that, the defendant concludes with an averment *et hoc paratus eſt verificare*, that there was no ſuch original.

Serjeant Draper and Serjeant Eyre *for the defendant*. The plaintiff has abated his ſuit by his own ſhowing; for he has laid all the premiſes in all the five counts to be on the firſt day of *September*, which is concluſive upon him that no cauſe of action aroſe before that time, and yet in his replication he ſets forth an original ſued out on the twenty-ſecond of *June*, which being before the cauſe of action, abates the ſuit. And they cited the caſe of *Lauden Jones*, an attorney of this court, *v. Burnett*, in Lord King's time, in the court of common pleas. The plaintiff brought his attachment of privilege teſted on the twelfth day of *February*, and declared as indorſee of a promiſſory note; to which the defendant pleaded, that the note was not indorſed till after the twelfth of *February*, and that the original was iſſued before any cauſe of action; the plaintiff replied, that *reverâ et in facto* the writ was not ſued out till the twelfth of *March*, although it was teſted the twelfth of *February* before, and that the note was indorſed before the actual ſuing out of the writ, although it was not indorſed before the *teſte*; to this there was a demurrer; and the Court held that the plaintiff had abated his ſuit of his own ſhowing.

Secondly, A plea *puis darrein continuance* cannot be pleaded in the firſt inſtance, but muſt be always pleaded after ſome former plea; and they cited the caſe of *Green v. Moor* (a), where a declaration was in *Trinity Term*, and the defendant pleaded the outlawry in bar, but did not ſay that the outlawry was *puis darrein continuance*, whereupon the plaintiff demurred; and the plea was held to be good enough, though it was not pleaded *puis darrein continuance*.

(a) 5. Mod. 12.

Willes, *Chief Juſtice.* This comes before the Court upon a demurrer after a declaration, a plea, a replication, and a rejoinder, and the demurrer is to the rejoinder; but notwithſtanding that, if the declaration be bad, the plaintiff cannot recover: if the plea is ill, judgment muſt go againſt the defendant: if the replication is wrong, the plaintiff muſt fail: but if the replication is good, and the rejoinder bad, then the plaintiff will ſucceed. It will be material, therefore, to conſider every one of theſe. At the firſt argument there were objections to every thing but the replication, and that was not quite ſpared; for it was ſaid, that by that the plaintiff had diſcontinued his own ſuit. The declaration is upon ſeveral promiſes, and conſiſts of five counts, every one of which is for ten pounds, and the total of the damages at the end of the declaration is laid at twenty pounds. The plea traverſes none of the counts, and therefore in fact admits the juſtneſs of the demand, the whole of which is laid to twenty pounds; but the defendant pleads a ſet-off, "That the plaintiff, before the obtaining his original writ, did by note promiſe to pay to the defendant eight pounds one month after *Michaelmas*, which eight pounds exceed the money due to the plaintiff." The plaintiff replies, the time of taking out the original writ, and traverſes the making of the note before that time, and this he is ready to verify. The defendant rejoins, that there was no ſuch original writ, *et hoc paratus eſt verificare.*

The declaration and replication are both good: but the plea is bad, both in ſubſtance and in form. I ſhall admit, that a note may be releaſed before it is payable, and by ſome late acts of parliament a creditor, whoſe note is not immediately payable, may come in for a diſtribution out of the effects of his debtor, if he is a bankrupt, and may alſo be a petitioning creditor for a commiſſion of bankrupt. But thoſe are not parallel caſes to the preſent; for the queſtion here is, Whether, at the time of his action brought by the plaintiff, there was a debt due to the defendant, upon which he could bring his action? for this ſtatute of Set-off was made to prevent multiplicity of actions; and if the defendant had a demand at the ſame time as the plaintiff had, he might have ſet it off againſt the plaintiff's demand, and then all would be determined by one action; but then both ought to have a right of action at ſuch time. But as this declaration was of *Michaelmas Term*, and by relation of the twenty-third of *October*, the defendant could not then bring an action upon ſuch note, which was not payable till the twenty-ninth of *September* following. And though the note was payable within a few days after the commencement of the action, yet if we determine that if a note payable within a day after an action brought may be ſet off againſt the demand of ſuch action, we know not where to ſtop. The law preſcribes no limits, and we ſhould in effect determine that a note may be ſet-off againſt a preſent demand, although ſuch note is not payable in one, two, or three years; and this determination would throw us upon this abſurdity, That a defendant might ſay to a plea, "I now owe you ten pounds, for

" which you have brought an action, but you ſhall not recover in " one, becauſe in two years time you will be indebted to me in the " ſame ſum;" which defence, at the very mention of it, abounds with injuſtice. It is further ſaid, that though this note was not payable at the time of the declaration, yet that it was due before the plea of ſet-off. This deſerves ſome more conſideration, and we muſt reflect whether the action was rightly brought or not; and to be ſure it was: wherefore it will be barred or abated according as the act which he committed ſounded either in abatement or in bar. But even in thoſe caſes, if the releaſe was given or the money accepted after a continuance by imparling, ſuch matter could not be pleaded by *actionem non*, but ought to be pleaded *puis darrein continuance*, and for this reaſon, becauſe the judgments differ; for upon a plea of *actio non*, the plaintiff muſt pay coſts, and be amerced if judgment is againſt him; but if the ſame matter be pleaded *puis darrein continuance*, and judgment againſt the plaintiff, he ſhall neither be amerced, nor pay coſts. And would it be reaſonable that the plaintiff ſhould pay coſts, &c. when at the time of commencing his ſuit, he had good cauſe of action, becauſe after that the defendant got an anſwer to the declaration? We need not go into the rejoinder; but that it might not be taken that the rejoinder is right, we have looked into that, and it is manifeſtly wrong. The plaintiff in his replication alledges the ſuing out of an original writ, *et hoc paratus eſt verificare*, and we determined in a late caſe that this concluſion is right, and that he could not conclude with a *petit quòd inquiratur per patriam*, becauſe he does not give the other party an opportunity of anſwering it; but when he has replied "an original," and made the proper averment, the defendant, upon the denying the iſſuing of ſuch original, ſhould have taken iſſue, and not have concluded with the ſame averment as the plaintiff had done, for if that was allowable, a cauſe would never come to iſſue; and where a man alledges a fact, and another denies it, he ſhould join iſſue, inſtead of concluding with an averment.

Fortescue and **Abney**, *Juſtices*, were of the ſame opinion.

Burnett, *Juſtice*. In order to plead a ſet-off by *actio non*, the demand of the defendant muſt be due at the time of iſſuing the original; for if the demand become due afterwards, it muſt be pleaded *puis darrein continuance*, notwithſtanding the caſe of *Green v. Moore* (a), where the Court ſeemed of opinion that outlawry in the plaintiff between the declaration and the plea need not be pleaded *puis darrein continuance*; but I doubt whether that caſe be law. The caſe of *Ewer v. Moyle* is plainly contrary; it was the caſe of a defence which accrued after action brought, and before plea pleaded in chief; and there one of the reaſons why the plea was held bad was, becauſe it accrued after the action brought, and ſhould not have been pleaded in bar, but *puis darrein continuance*. In the caſe of *Green v. Moore*, the Court might, perhaps, diſtinguiſh an outlawry, which is a matter of record, from a matter *in pais*, which was the caſe of *Ewer v. Moyle*, but I can ſee no reaſon for that diſtinction. Upon the whole, I am of the ſame opinion as my brothers.

(a) 1. Salk. 178. 5. Mod. 11. See alſo 5. Term Rep. 224.

Judgment was given for the plaintiff.

Atkinſon *againſt* Seetree.

Caſe 357.

Difference between THE MARSHALSEA and THE PALACE COURT.

SIR THOMAS ABNEY, *Juſtice*, gave this account of the difference between the antient COURT OF MARSHALSEA, and that which is now vulgarly called by the ſame name, but more properly THE PALACE COURT.

KING JAMES THE FIRST erected the latter; its juriſdiction extends twelve miles round the palace of WHITEHALL; and the Judge may hold the court where he pleaſes, except in the four great courts at *Weſtminſter*, or in the duchy court. The antient Marſhalſea court which is the ſubject of the caſe in *Sir Edward Coke's Reports*, is ſtill ſubſiſting, and is a travelling or moveable court, and its juriſdiction reaches twelve miles round about the court where the King ſhall be then reſident. The parties or ſuitors in the old Marſhalſea court muſt be of the houſhold, but thoſe of THE PALACE COURT muſt not be of the houſhold; for if they are of that, they muſt have recourſe to THE MARSHALSEA COURT. The ſuits are more troubleſome in the latter, becauſe the court is conſtantly removing: the ſteward of the Marſhalſea is nominated by the lord ſteward or maſter of the houſhold; but the Judge of the palace court, or that which is now commonly called "The "Marſhalſea," is appointed by the King's letters patents.

Milbourn *againſt* Reade.

Caſe 358.

THIS was an action of treſpaſs, wherein the plaintiff declared, "that the defendant with force and arms did make an aſſault "upon the plaintiff in the pariſh of *A.* in the county of *Northumberland*, and did there beat, wound, and evil entreat the plaintiff, ſo "that his life was deſpaired of, and did then and there alſo "obſtruct the plaintiff from getting of coals, and the coals of the "plaintiff there found, took, and carried away of the goods and "chattels to the value of ten pounds, trod upon and ſpoiled, and "one ſtandard of the plaintiff there lately erected, and one roller "fixed thereupon of the value of one hundred ſhillings, did take, "break, and pull down, and other goods and chattels to the value "of ten pounds did take and carry away." There was A SECOND COUNT very little variant from the firſt. The defendant pleaded *not guilty*.

If any other treſpaſs, not within the ſtatute 22. Car. 2. c. 9. as a *ſpecification* of perſonal chattels, be ſtated in the declaration in an action of aſſault and battery, as a ſubſtantive and independent injury, and for which a diſtinct ſatisfaction might be obtained in a ſeparate action, the plaintiff, on a *general verdict* in his favour ſhall have *full coſts*, though the damages are under *forty ſhillings*.—S.C. 2. Barnes' Notes, 108. S.C. 3. Wil. 325 cited.

THE JURY find, that as to all the premiſes laid to the charge of the defendant, he is thereof *guilty*, except as to the taking away of the goods and chattels in the declaration mentioned; and aſſeſs damages for the plaintiff by reaſon thereof to five ſhillings, and coſts at five ſhillings; and as to the taking away of the ſaid goods and chattels, they find the defendant *not guilty*.

Upon this verdict, there was no *certificate* of the Judge that the aſſault, &c. was ſufficiently proved, or that the title, &c. was in queſtion.

THE QUESTION was, Whether the plaintiff ſhould be intitled to full coſts? his damages being found to be leſs than forty ſhillings; and, Whether his caſe is within the ſtatute of 22. and 23. *Car.* 2. c. 9. ſ. 136. If it be, he is clearly not intitled to coſts, becauſe the Judge who tried the cauſe has not certified as that ſtatute requires.

WILLES, *Chief Juſtice*. The plaintiff in this cauſe has proceeded to tax his coſts with the prothonotary, and the defendant has obtained a rule to ſhew cauſe why ſuch taxation ſhould not be ſet aſide, upon this foundation, that the plaintiff is not intitled to full coſts, his damages being under forty ſhillings, and the Judge not having certified upon the ſtatute of 22. and 23. *Car.* 2. c. 9. ſ. 136. In order to give my opinion, I ſhall proceed through the ſeveral ſtatutes of coſts: I ſhall not ſay much of the ſtatute of *Glouceſter*, for undoubtedly by that the plaintiff is intitled to full coſts, unleſs reſtrained by the later ſtatutes. The only queſtion is, Whether or no the ſtatutes ſubſequent to that of *Glouceſter* have prevented the plaintiff from having full coſts? The firſt ſtatute is 43. *Eliz.* c. 6. ſ. 2. whoſe title is, "An act to prevent trifling and "frivolous ſuits in law in her majeſty's courts of *Weſtminſter*;" and which ſtatute, for its uſefulneſs, ought to have been put in execution, though it was never done ſo until the Sittings after laſt Term, although it is the only foundation that the Courts of *Weſtminſter* can go upon in the conſtruction of the ſtatute of 22. and 23. *Car.* 2. c. 9. ſ. 136. The ſtatute of 43. *Eliz.* c. 6 ſ. 2. enacts, that "If, upon any perſonal action to be brought in any "of the courts at *Weſtminſter*, not being for any title or intereſt "of lands, or concerning the freehold or inheritance of any lands, "nor for any battery itſelf, it ſhall appear to the Judges for the "ſame court, and ſo ſignified or ſet down by the Juſtices before "whom it ſhall be tried, that the debt or damages to be recovered "therein in the ſame court ſhall not amount to the ſum of forty "ſhillings or above; that in every ſuch caſe, the Judges and Juſtices before whom any ſuch action ſhall be purſued, ſhall not "award for coſts to the party plaintiff any greater or more coſts "than the ſum of the debt or damages ſo recovered ſhall amount "unto, but leſs at their diſcretions." This ſtatute of 43. *Eliz.* c. 6. has been taken frequently, in common conſideration, I don't ſay in legal or judicial proceedings, to have given the Judges an authority

Milbourn *againſt* **Reade.**

authority to certify, in order to intitle the plaintiff to coſts. But the caſe is juſt the reverſe; for the plaintiff would have his coſts as before by the ſtatute of *Glouceſter*, unleſs the Judge certifies upon the 43. *Eliz.* to prevent his having coſts. But as the Judges never certified upon the 43. *Eliz.* it had no effect at all; for though the ſuit was frivolous, and the plaintiff recovered leſs than forty ſhillings, yet he had ſtill his full coſts upon the ſtatute of *Glouceſter*, and could be only deprived of them by a certificate of the Judge upon the 43. *Eliz.* c. 6. and it appears from the caſe of *Reeves v. Butler (a)*, that there had never been any ſuch certificate ſince the making of that ſtatute. If the preſent was a new caſe, I doubt whether I ſhould conſtrue the ſtatute of 22. and 23. *Car.* 2. agreeably to the later reſolutions; I think I ſhould not; but it would be a dangerous thing *quieta movere*, or to adjudge contrary to a great ſucceſſion of caſes for above theſe fifty years; but I ſhall adhere to thoſe caſes, eſpecially as the latter part of that ſtatute enacts, that where coſts ſhall be given contrary to that ſtatute, the judgment ſhall be void. This is a ſtrong reaſon with me for adhering to the many later reſolutions; for if I was to determine that this ſtatute had been miſconſtrued as to coſts, and that the Judges had given greater coſts in ſome actions without a certificate than that act of parliament entitles them to do, I ſhould make all thoſe judgments liable to be reverſed by writs of error, in all caſes where ſuch writs of error were not barred by the ſtatute of Limitations. It is true, that immediately after the making of the ſtatute of 22. and 23. *Car.* 2. the Judges, upon conſultation with the prothonotaries, ſeem to have been of opinion that that ſtatute extended to other actions beſides thoſe of aſſaults and battery, and actions of treſpaſs *quare clauſum fregit*, as appears from the caſe of the *Earl of Pembroke v. Weſtale (b)*, ſomething above two years after that ſtatute was made; but ſince the twenty-fifth year of *Charles the Second*, it has been the conſtant uniform reſolution of the Courts at *Weſtminſter*, that the ſtatute of 22. and 23. *Car.* 2. c. 9. was not to be extended to other actions, but to be confined to actions of aſſaults and battery, and treſpaſs *quare clauſum fregit*, as appears from the caſe of *Smith v. Batterſon (c)*. The reaſon given in ſome Books, to take a caſe out of the ſtatute 22. and 23. *Car.* 2. c. 9. is frivolous and idle; as that there was a deſtruction or ſpoliation of a chattel, or an *aſportavit* of a chattel: the talking in this way ſeems to ſhew an endeavour in the Judges to find out a reaſon to take caſes out of the ſtatute; and becauſe they could not find a good one, they were willing to adopt any reaſon. The ſpoliation and *aſportavit* of a mere perſonal chattel is clearly out of the ſtatute, for neither of them can amount to an evidence that the title of the land was in queſtion; which is requiſite to be certified to bring the caſe within 22. and 23. *Car.* 2. c. 9. In giving my opinion in this caſe, that the plaintiff is intitled to full coſts without a certificate from the Judge, upon 22. and 23. *Car.* 2. c. 9. I do not

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(a) Bunb. 207. Rep. Eq. 195.

(b) 3. Keb. 247.

(c) Raym. 487. T. Jones, 232. 2. Show. 258.

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MILBOURN against READE.

at all rely upon an *aſportavit* or the ſpoliation of a chattel, but lay them quite out of the caſe; but what I rely upon is, that the plaintiff, in no caſe where his damages are under forty ſhillings, needs the certificate of a Judge to intitle him to full coſts, except either in actions for aſſault and battery, or treſpaſs *quare clauſum fregit*, which is the foundation of the judgments in the caſe of *Venn v. Phillips (a)*, and that of *Thompſon v. Berry (b)*, on both which caſes I found myſelf. The Judges in neither of theſe caſes paid any regard to the ſpoliation, or *aſportavit*. In the caſe of *Venn v. Philips*, the Court could not go upon the *aſportavit* of the hog, for of that the defendant was found not guilty; nor could they go upon the ſpoliation or deſtruction of the ſheep, as appears from the reaſon they give in the caſe, which is, that that ſtatute extends only to ſuch caſes where the Judges can certify, and they can only certify in aſſault and battery, and treſpaſs *quare clauſum fregit*; for the ſtatute of 22. and 23 *Car*. 2. c. 9. as to all other caſes but thoſe two, leaves them upon the 43. *Eliz*. c. 6. thinking that effectual enough as to them. Since the making of the ſtatute 22. and 23. *Car*. 2. c. 9. the plaintiff cannot have coſts in aſſault and battery and *clauſum fregit*, unleſs the Judge certifies purſuant to the act; but as to all other perſonal actions, wherein there can be no certificate upon the 22. and 23. *Car*. 2. c 9. as debt, *aſſumpſit*, trover, treſpaſs for ſpoiling his goods, or taking his goods, &c. they ſhall be conſidered out of the ſtatute of the 22. and 23. *Car*. 2. and in ſuch caſes the plaintiff, though his damages are found to be under forty ſhillings, ſhall be intitled to full coſts by the ſtatute of *Glouceſter*; but if the Judge think the ſuit very frivolous and vexatious, he may deprive the plaintiff of the benefit of the ſtatute of *Glouceſter*, by certifying under the 43. *Eliz*. c. 6. by which the plaintiff will be intitled to no more coſts than damages, and to leſs if the Judge thinks fit. And I hope that good ſtatute will be put in practice, as I have led the way by certifying upon it very lately. The next ſtatute relating to coſts is the 8. and 9. *Will*. 3 c. 11. ſ 4. for preventing wilful and malicious treſpaſſes; upon which, if any defendant ſhall be found guilty of a wilful and malicious treſpaſs, the plaintiff ſhall recover not only his damages, but his full coſts of ſuit, any former law to the contrary notwithſtanding. This ſtatute plainly ſhews, that the Legiſlature did not underſtand the ſtatute of the 22. and 23. *Car*. 2. c. 9. in the ſame manner as the courts at law did, *viz*. to confine it to two ſorts of actions, but that it extended to all other perſonal actions; for the ſtatute of 8. and 9. *Will*. 3. was intended not only to relieve in the very ſame ſorts of actions as the ſtatute of *Charles the Second* did, but gave coſts upon a different principle; not to prevent frivolous and vexatious ſuits, as the ſtatute of *Charles the Second* was, but of all ſorts of wilful and malicious treſpaſſes, and that not malicious treſpaſſes in lands only, but of all ſorts; and if the Legiſlature, thro' the ſtatute of *Charles the Second*

(a) 1. Salk. 208. and ſee Mr. Evans's note to the Sixth Edition of this work.

(b) In the common pleas, Eaſter Term, 7. *Geo*. 2. Reported 1. Strange 551.

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took away coſts from no treſpaſſes beſide treſpaſſes *clauſum fregit*, they have no reaſon to make the ſtatute of the 8. and 9. *Will.* 3. c. 11. ſ. 4. general, and ſo be extended to all treſpaſſes. In order to reconcile the two acts of parliament, there has been a conſtruction put upon the latter which I will not adhere to; it is, that the ſtatute of *William the Third* extends only to *clauſum fregit*, and the fact is, that there has been no certificate upon that ſtatute but in *clauſum fregits*; though the ſtatute is not reſtrictive in its words, but generally of all treſpaſſes, and made to prevent wilful and malicious treſpaſſes generally. But there are other actions of treſpaſs beſides thoſe of *clauſum fregit*, wherein I will grant certificates upon this ſtatute, though none were ever granted before. In actions of treſpaſs, indeed, for taking goods and chattels merely, I will not grant certificates upon this ſtatute of *William the Third*, for the abſurdity of it. Becauſe, as we have determined that the ſtatute of the 22. and 23 *Car.* 2. extends only to *clauſum fregits*, it would be ridiculous to certify in perſonal treſpaſſes; becauſe, in thoſe, the plaintiff, though his damages found exceed not forty ſhillings, will have full coſts upon the ſtatute of *Glouceſter*, except the Judge certifies upon the 43. *Eliz* c. 6. to prevent his having full coſts. The caſe in which I will certify upon the ſtatute of the 8. and 9. *Will.* 3. c 11. ſ. 4. though not a treſpaſs *quare clauſum fregit*, is in an action of treſpaſs for a voluntary and malicious aſſault which is not attended with a battery; for I cannot certify upon the ſtatute *Charles the Second* for an aſſault only, but I muſt, by the expreſs words of the ſtatute, certify that the aſſault and battery were ſufficiently proved. Suppoſe a man draw his ſword, and ſwear he will ſtab me, and ſtrike at me, but miſs me; in this caſe I cannot certify upon the ſtatute *Charles the Second*, becauſe there was no battery, but I will certify upon the 8. and 9. *Will.* 3. c. 11. ſ. 4. that ſuch treſpaſs or aſſault was wilful and malicious, and let the defendant deliver himſelf from coſts how he can. Such a dangerous aſſault much better deſerves a certificate upon the ſtatute 8. and 9. *Will.* 3. than many an aſſault and battery does upon the ſtatute 22. and 23. *Car.* 2. I ſhall only take notice of two or three more little caſes, which do not come up to or influence the preſent; ſuch as the caſes in *Comb.* 420. *Carthew*, 224, 225. 2. *Vent.* 180. 195. All thoſe caſes are plainly within the ſtatute of the 22. and 23. *Car.* 2. c. 9. in which caſe the plaintiff could not have more coſts than damages, if the latter were under forty ſhillings, except the Judge certified; for in all thoſe caſes the treſpaſs was committed upon things, for the treſpaſſing on which the title of the land might come in queſtion; they were either for pulling up or throwing down a hedge, or for digging of the ſoil, or for ſtopping a water-courſe and overflowing the land, all which are treſpaſſes upon the land, and therefore within the ſtatute; and if the Judge would not certify that the title of the land came in queſtion, the Judges did right in refuſing full coſts. The two caſes in 2. *Vent.* 180. 195. are both of them *clauſum fregits*, and are not merely perſonal; and that is the reaſon which *Lord*

Chief

MILBOURN *againſt* READY.

Chief Baron GILBERT went on, in the caſe of *Butler v. Reeves*[(a)], a caſe which was very ſolemnly determined. It is objected, that the plaintiff ſhall not have full coſts in this caſe, becauſe part of the verdict is within the ſtatute of the 22. and 23. *Car.* 2. and that therefore the Judge ought to have certified, that the treſpaſs in the declaration is not only for the taking, breaking, and pulling down of a ſtandard and roller, which are perſonal chattels, but alſo for an aſſault, battery, and wounding; and that as the damages found are under forty ſhillings, the plaintiff ſhall not be intitled to full coſts, unleſs the Judge certifies that the aſſault and battery was ſufficiently proved. But I am of opinion, that that will not alter the caſe, but the plaintiff will be intitled to his full coſts without a certificate, notwithſtanding the defendant is found guilty of the aſſault, battery, and wounding; for if that would make any alteration, the defendant would need only to clap it into the verdict, and he will thereby deprive the plaintiff of his coſts; but that finding in the verdict ſhall make no alteration as to coſts, ſince the defendant is found guilty of other things in the declaration for which the plaintiff is clearly intitled to coſts without any certificate from the Judge. It is further objected, that the treſpaſs of breaking the roller and ſtandard is ſuch a treſpaſs whereupon the title of the land might come in queſtion, and ſo a certificate neceſſary to carry coſts, but the title of the land could not, in the preſent caſe, come in queſtion; for the ſtatute ſays, "that the "plaintiff ſhall have no more coſts than damages, where the "damages are under forty ſhillings, unleſs the Judge certifies that "the freehold or title of the land mentioned in the declaration came "chiefly in queſtion." Now the preſent treſpaſs committed upon the ſtandard and roller is not laid to be done on the land of the plaintiff, or on any particular land, but only generally in the pariſh of *A.* which plainly ſhews that the title of the land could not come in queſtion as the ſtatute requires, and ſo out of the ſtatute, and no need of a certificate; for a certificate within the meaning of the ſtatute would be impoſſible to be made in the preſent caſe, there being no land laid in the declaration. There was an argument uſed, that ſuppoſing the plaintiff could not have full coſts in this caſe, becauſe his damages are found to be under forty ſhillings, unleſs he ſhould intitle himſelf to them by a proper certificate, yet there being a wounding laid in the declaration, and alſo found by the verdict, the Court may upon view, &c. increaſe the damages to above forty ſhillings, and then, beyond all manner of diſpute, the plaintiff will be intitled to full coſts upon the ſtatute of *Glouceſter*, and needs no certificate. But there has been a caſe cited, 1. *Raym.* 566. in point, where there was a wounding laid in the declaration, and alſo found by the verdict, yet held, that it would not carry coſts; and the rather not for two reaſons; the one, that a wounding is laid in every declaration of aſſault and battery of courſe, and it is not material whether the verdict finds any thing about it or not; for I never knew in my practice, that upon not guilty to the whole count of aſſault, battery, wounding, &c. that it would be neceſſary to find the defendant not guilty as to the wounding. A maim or *gravidus* wound particularly laid in a declaration is material, but a general wounding is of courſe thrown into declarations, and we cannot increaſe the damages upon a general wounding in a declaration and verdict. Beſides, where the damages are only found under forty ſhillings, the wounding muſt be trifling and inconſiderable, ſo that I lay no weight at all upon the wounding. The other reaſon againſt the wounding being material is, that the Judge is not bound or concluded by the verdict; becauſe, if he was, there would be no room for a certificate; but the power of certifying is left to the Judge, let the jury find whatever they will, ſo that the damages given do not exceed forty ſhillings: and as the Judge is not bound by the jury's finding a battery, he is not bound by the jury's finding a wounding.

(a) Bunb. 207. Gilb. Eq. Rep. 135.

I found my opinion upon the reaſon in the caſes of *Venn v. Philips* (*a*), and *Thomſon v. Berry*, without regard to *aſportavits* or ſpoliation; which reaſon is, that there is no caſe within the ſtatute 22. and 23. *Car.* 2. c. 9. ſ. 136. but treſpaſs *quare clauſum fregit*, or aſſaults and battery; and that in all other caſes, a plaintiff who recovers upon a perſonal action damages under forty ſhillings, is intitled to full coſts upon the ſtatute of *Glouceſter*, without any certificate upon the ſtatute of *Charles the Second*, unleſs he is prevented by a certificate upon the 43. *Eliz.* c. 6. ſ. 2. I am therefore of opinion that the plaintiff is intitled to full coſts.

ABNEY, *Juſtice*, was of the ſame opinion.

BURNETT, *Juſtice*. I am of the ſame opinion: the plaintiff in the preſent caſe is intitled to full coſts. And in order to conſider this matter, it will be firſt neceſſary to ſtate the verdict, to ſee what the defendant is found guilty of, for what he is not guilty of may be laid out of the caſe. It is true, that he is not only found guilty in *A.* of the aſſault, battery, and wounding, but alſo for treading upon and ſpoiling the coals, and breaking and ſpoiling the ſtandard and roller. Not only in a *mayhem*, but in a wounding ſpecially deſcribed in the declaration, or certified by a Judge, or made out by affidavits, the Courts have thought themſelves intitled to increaſe the damages, but the preſent is a general wounding, and is thrown of courſe into the declaration. As to increaſing the damages, that is not now before the Court, and therefore to be laid out of the preſent caſe. The whole will therefore depend upon the defendant's being found guilty of an aſſault and battery, and of the ſpoiling of perſonal chattels, upon which there is no certificate, although the damages recovered are under forty ſhillings. The queſtion is, Whether a certificate is

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(*a*) Salk. 208.

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neceſſary to intitle the plaintiff to his coſts? The firſt ſtatute is the 43. *Eliz.* c. 6. and by that in perſonal actions for aſſault and battery, or where the title or inheritance of the land is concerned, the plaintiff, though he recover ever ſo ſmall damages, would be intitled to his full coſts upon the ſtatute of *Glouceſter*; ſo he would in all other perſonal actions for aſſault and battery, if the Judge did not certify to deprive him of them. But the Judge had a diſcretionary power to exclude the plaintiff from full coſts, where his damages were under forty ſhillings in all perſonal actions but thoſe of aſſault and battery, or where the title or inheritance of land is concerned, for in thoſe he cannot certify to deprive the plaintiff of full coſts. And though no certificates have been granted upon the ſtatute of *Elizabeth* till very lately, and by my *Lord Chief Juſtice* Willes, yet many Books take notice that ſuch certificates might be granted (*a*). The reaſon why the Judges have always refuſed to certify upon the 43. *Eliz.* c. 6. has been this, perhaps, That as cauſes were very injudiciouſly tried in inferior juriſdictions in the country, the Courts of *Weſtminſter* would not ſo far reſent the plaintiff's coming into *Weſtminſter Hall*, as to certify upon 43. *Eliz.* c. 6. to deprive him of full coſts where his damages were under forty ſhillings, eſpecially as he had an evident right to ſue ſomewhere, as appears by his obtaining a verdict; and they therefore thought it too ſevere a law to confine men to ſue in country courts, where the Judges are frequently ſo incapable of determining properly, however the defendant was intitled to a certificate upon the 43. *Eliz.* c. 6. to deprive the plaintiff of full coſts, if the Judge in his diſcretion ſhould think the caſe deſerved it. The next ſtatute is the 22. and 23. *Car.* 2. c. 9. ſ. 136. upon which, although it mention not only actions in aſſault and battery, and treſpaſs, but other perſonal actions in general, the conſtruction has been to reſtrain it to two caſes only, which are treſpaſs *quare clauſum fregit*, and aſſault and battery. The reaſon of ſuch conſtruction was this: The ſtatute enacts, "that in all actions of treſpaſs and aſſault and battery, "and other perſonal actions, wherein the Judge ſhall not certify in "aſſault and battery ſufficiently proved, or that the title of the land "came in queſtion, there ſhall be no more coſts than damages found "are under forty ſhillings." So that though the firſt words are general, yet the latter words are reſtrained to ſuch actions wherein there can be ſuch certifying of the battery or the like. *Keble*, who, though an inaccurate Reporter, is a pretty good hiſtorian of the law, proves to us, that there was ſome doubt in the Courts, ſoon after this act of parliament of the 22. and 23. *Car.* 2. in the caſe of *Brown v. Taylor* (*b*). That was an action upon the caſe for diſturbing the plaintiff in his common, and one penny damages, and reſtitution of coſts prayed, there being no certificate on the trial. But it was not allowed; for by the Court it has been reſolved by the major

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(*a*) See Styleman *v.* Patrick, 3. Mod. 143. and the caſes there cited.

(*b*) 3. Keb 31.

part of the Judges of *England*, that the ſtatute 22. and 23. *Car.* 2. c. 9. extends only to treſpaſs, and aſſault and battery, and not to actions upon the caſe, or *aſſumpſits*, or ſuch like. But this book does not only appear poſſible in thoſe two caſes only. The next caſe is in 3. *Keb.* 31. and the Judges by that determine that the ſtatute *Charles the Second* was not confined to treſpaſs *quare clauſum fregit* only, but takes in other perſonal treſpaſſes. The next reſolution is in *Orpwood v. Holden* (*a*), which is contrary to 3. *Keb.* 121. and agreeable to 3. *Keb.* 31. The next caſe on the ſame ſubject, is *Dicer v. Stanton* (*b*); but it was adjourned. After theſe came the caſe in *Raym.* 487. 2. *Jones*, 232. and 2. *Show.* 258. and that was quite like the preſent caſe. The treſpaſs was laid generally in the pariſh, as this is, and not ſpecially in any land of the plaintiff, ſo as to bring the title in queſtion, and the Court held it out of the ſtatute, and full coſts were given, though there was no certificate. Since that caſe there have been many uniform judgments, where an action of treſpaſs of a perſonal chattel has been held out of the ſtatute of *Charles the Second*. As to actions of treſpaſs *quare clauſum fregit*, for digging of the plaintiff's ſoil, and pulling up his hedge, &c. or overflowing his land, theſe being injuries immediately to the freehold, and it being poſſible for the title of the land to come in queſtion upon ſuch action, the plaintiff ſhall not have full coſts without a certificate, becauſe it is a caſe within the ſtatute, and whereupon the Judge might certify that the title of the land came in queſtion. But if the plaintiff had declared further, as that beſides the breaking and entering the cloſe, and pulling up the hedge, the defendant had carried it away, and the jury had found him guilty of the pulling up the hedge as well as the former, he ſhould have his full coſts without a certificate (*c*). The pulling up the hedge is a plain injury to the freehold, but when it is pulled up and ſevered from the freehold, it ceaſes to be part of it, and the owner of the land has it as a chattel; in which caſe, if the treſpaſſer carry the hedge away, or burn, or deſtroy it, all theſe are perſonal injuries, and out of the ſtatute, and an action will lie, as in the caſe of ſpoiling any other chattel. And there is a ſpoliation of a chattel in the preſent caſe, upon which the party might have brought his ſeparate action, and have recovered full coſts without a certificate (*d*).

(*a*) 3. Keb. 389.

(*b*) 3. Keb. 469.

(*c*) Com. Rep. 19.

(*d*) See Carothers *v.* Lamb, Barnes, 120. Cotterel *v.* Tolly, 1. Term Rep. 655. Atkinſon *v.* Jackſon, cited 1. H. Bl. Rep. 295. Mears *v.* Greenway, 1. H. Bl. Rep. 291. See alſo Hullock on Coſts, 42 48. 50. where all the caſes on this ſubject are collected.

Caſe 359.

George *againſt* Kinch.

In treſpaſs, if the defendant juſtify taking the cattle *damage feaſant*, as ſervant to, and by the command of, his maſter, and the plaintiff reply *a licence* from the maſter, and *traverſe the command* to the ſervant, the replication is *double*, and an iſſue on ſuch traverſe is an *immaterial iſſue*; but theſe errors are aided by *a verdict* for the plaintiff.
Cro. Jac. 377.
Cro. Eliz. 876.
Yelv. 151.
Cro. Car. 61.
Lutw. 1558.
2. Saund. 50.
Fort. 389.

THIS was an action of treſpaſs. The declaration charged the defendant with three ſeveral treſpaſſes. One a local treſpaſs, for breaking and entering the plaintiff's cloſe at *Aſtrue* in the county of *Northampton*, and there taking, chaſing, driving away, impounding, and detaining in the pound, five rams of the plaintiff. Another treſpaſs, for breaking, &c. of the ſaid rams, is laid tranſitorily in the pariſh of *Aſtrue* generally, not confining it to any particular land or cloſe of the plaintiff. The laſt treſpaſs complained of is for cutting and bruiſing five of the plaintiff's rams.

The defendant pleaded "*not guilty*" as to all the treſpaſſes in the declaration, except the tranſitory one of taking, chaſing, &c. four rams of the plaintiff's: - and upon that iſſue is joined. But as to the tranſitory treſpaſs of taking, chaſing, &c of the plaintiff's four rams, the defendant juſtified, and ſaid, that the place in which the four rams were taken, &c. did contain two acres, lying in the common field of *Aſtrue*, and ſet forth the abuttals and boundaris of the two acres, and that the ſaid two acres were the ſoil and freehold of *Peter Haines*; and that the defendant, as ſervant of *Peter Haines*, and by his command, took the four rams doing damage there, and impounded and detained them in the pound, as is charged in the declaration, and was lawful for him to do; which is the ſame treſpaſs as the plaintiff complains of.

The plaintiff replied, that true it is that the four rams were taken in the ſaid two acres ſet forth in defendant's plea, and that the ſaid two acres were the ſoil and freehold of *Peter Haines*; but ſaid, that *Peter Haines* licenſed the plaintiff to put in and depaſture the four rams in thoſe two acres, and that the rams were there by ſuch licence, until the defendant in his own wrong took, chaſed, and impounded them; and TRAVERSED, that *Peter Haines* commanded the defendant to take the ſaid rams as ſervant, and by the command of *Peter Haines*.

To this there is a rejoinder, and an iſſue taken upon the traverſe, and a verdict for the plaintiff upon both iſſues, and damages to five ſhillings.

SERJEANT BELFIELD *in arreſt of judgment*. The queſtion is, Whether the plaintiff can have judgment upon this verdict and record? It is clear that he cannot; for if he may, it muſt be for the entire damages found by the verdict, becauſe, as the jury have not diſtinguiſhed the damages, or apportioned them upon theſe reſpective iſſues, the Court cannot do it. The plaintiff cannot have judgment for the entire damages, becauſe the defendant's juſtification of taking the four rams *damage feaſant* has not been tried, nor can be come at or enquired of by the jury, becauſe of an immaterial foreign iſſue, which has crept into the record, and has aggravated the damages to ſome, but to what degree is uncertain.

THE FIRST POINT conſiderable will be, Whether the ſecond iſſue upon this record be really *an immaterial iſſue*, or not?

THE OTHER POINT: If it be ſo, Whether it be cured by the verdict, or any of the ſtatutes of jeofails, ſo that the Court, by means of any of thoſe ſtatutes, may give judgment for the plaintiff without awarding *a repleader* to try the defendant's juſtification?

As to THE FIRST POINT, Such iſſue is totally immaterial both in law and reaſon. The caſe is ſhortly this: A ſervant ſees the cattle of a ſtranger treſpaſſing upon his maſter's land, chaſes them out, and impounds them, without applying for a particular command from his maſter for that purpoſe, for which honeſt act of the ſervant the owner of the cattle brings treſpaſs, the ſervant pleads to the action, and muſt plead according to the law, that he was ſervant, and by command of his maſter took the cattle *damage feaſant*, and impounded them, as lawfully he might do; the plaintiff takes iſſue upon the command of his maſter to the ſervant only; and the queſtion is, Whether that is a material point to take iſſue upon? or, Whether the ſervant can be ſaid to miſdemean himſelf by taking ſuch punctual care of his maſter's ground, by driving out treſpaſſing cattle without ſtaying for an expreſs command from his maſter? He certainly has not miſbehaved, for it is his duty to hinder the cattle from doing further damage, and needs not go home to his maſter for an expreſs command to do that which is inſeparably his duty; and for this further reaſon, becauſe if he were to wait for his maſter's commands, the cattle might be gone, and the remedy for the *damage feaſant* loſt; and for this reaſon it is, that proprietors of land have a right or privilege to diſtrain in the night, which they cannot do for rent; and he cited *Lee's Caſe* (*a*), as expreſs in point. He then cited *Bridgewater v. Bythway* (*b*): In battery the defendant pleaded a judgment and an execution, and that the plaintiff aſſaulted the bailiffs, and would have reſcued the goods; whereupon in act of the bailiffs, and by their command, *molliter manus impoſuit* upon the plaintiff, to prevent his reſcue of the goods; the plaintiff replied *de injuriâ ſuâ propriâ*, and traverſed the command of the bailiffs, and the defendant demurred generally; and, upon argument, it was reſolved by THE WHOLE COURT, that the replication in traverſing the command of the bailiffs was not good, for he might of himſelf do that to prevent a reſcue, which is a tort and breach of the peace.

As to THE OTHER POINT, Whether this *immaterial iſſue* be helped by the verdict, or any of the ſtatutes of jeofails, eſpecially the 32. *Hen.* 8. ſo that the Court, by means of that or any other ſtatute, may give judgment for the plaintiff without awarding a repleader to try the defendant's juſtification? he cited to ſhew that it is not helped, but that *a repleader* ought to be awarded, the caſe

(*a*) 1. Roll. Rep. 46. (*b*) 3. Lev. 113.

of *Read v. Dawſon* (a); wherein all the Juſtices were of opinion, that ſince the making the ſtatute of the 32. *Hen.* 8. this difference had been always taken and allowed, that when the iſſue is perfectly material, there ſhall be no repleader, but that it was otherwiſe where the iſſue was not immaterial. And more eſpecially in the preſent caſe, there ſhall be a repleader after the trial of this immaterial iſſue, becauſe the defendant has ſet forth ſufficient matter to excuſe himſelf from the action, for then there will appear upon the record ſufficient matter pleaded, without any verdict to try the truth of ſuch juſtification; and it would be againſt common right and juſtice, that a fair and honeſt defence appearing upon the record by means of an immaterial iſſue intervening, ſhall not be tried, and the defendant thereby be ſtripped of a fair legal juſtification. And to this purpoſe he cited *Pitts v. Polehampton* (b), where Holt, *Chief Juſtice*, takes this diſtinction: That where the defendant's plea confeſſes the duty demanded by the plaintiff, and does not avoid it ſufficiently, if the iſſue joined be immaterial, and found for the plaintiff, he ſhall have judgment, and no repleader ſhall be awarded; for if tried again, it will do the defendant no good; but if the plea goes in diſcharge of the action, and the iſſue is taken immaterially, and a verdict for the plaintiff, a repleader ſhall be awarded: which diſtinction reconciles almoſt all the Books, and puts the thing upon the foundation of law and reaſon.

Serjeant Draper *on the other ſide*. The iſſue in the preſent caſe is not immaterial, for the command is traverſable. I muſt admit, that if the iſſue is immaterial, there ought to be a repleader. If a ſervant has a general authority to look after the land of his lord, the power of diſtraining cattle *damage feaſant* is implied, for that falls within the general authority; otherwiſe where the ſervant has no expreſs or general authority to ſuperviſe the land, for there he muſt wait for a ſpecial authority from his maſter before he can diſtrain, and therefore a command to diſtrain in ſuch caſe being neceſſary, it is traverſable. Upon a former argument, 1. *Ro. Abr.* 339. *C. pl.* 4. was cited, and *Litt.* 70. that a bailiff of a manor may either himſelf take cattle *damage feaſant* upon the land, or command others to do it; but this is extremely different from the caſe of a common ſervant; for a bailiff of a manor is a high officer, in nature of a ſheriff; has the care of all things within the manor; and is inveſted with great powers and juriſdictions; and differs in his authorities from a common ſervant as much as poſſible. The bailiff of a manor may do anything for the benefit of his lord, and his act ſhall be valid until the lord diſagree with it; and the power to diſtrain cattle *damage feaſant* in a bailiff of a manor, ariſes from his general authority to ſuperintend the manor.

(a) 2. Mod. 139, 140. (b) 1. Ld. Ray. 390.

It was objected upon a former argument, that the replication was ill for duplicity, *viz.* replying a licence from *Peter Haines* to put in the plaintiff's cattle, and traverſing the command of the defendant as ſervant. That the plaintiff ſhould have reſted his caſe upon the licence, which would be ſufficient to have proved the defendant guilty of the treſpaſs, and that he ſhould not have traverſed the command, for now he has put two matters in iſſue. But I muſt ſubmit it, that replying the licence does not make the replication double; for the licence is not replied upon, but is only inducement to the traverſe; and if it is replied by way of inducement only, it is not material whether the licence is true or falſe, and could not be traverſed. But ſuppoſing there is duplicity in the replication, yet that is cured after verdict, though it would have been fatal upon demurrer.

WILLES, *Chief Juſtice*, would give no opinion in this, one of the parties in this ſuit being his tenant, and ſo himſelf intereſted; whereupon he referred it to SIR THOMAS ABNEY and BURNETT, *Juſtices*.

SIR THOMAS ABNEY deſired a day or two to conſider of this caſe before he gave his opinion.

But BURNETT, *Juſtice*, delivered himſelf at large, that judgment ought to be for the plaintiff.

BURNETT, *Juſtice*. I do not think there is any diſtinction in reality between a maſter's giving a general or ſpecial authority to his ſervant, though that has been inſiſted upon to make the preſent iſſue immaterial. I always took it that the defendant, where he juſtifies as ſervant, is to ſet forth in pleading a general command from his maſter, and may give in evidence either a general or ſpecial command: and upon ſuch pleading of a general command, though it appears in evidence that there was no command at the time of the diſtreſs of the plaintiff's cattle *damage feaſant*, yet if the maſter aſſented to the diſtreſs of the ſervant afterwards, that ſhall be ſufficient to juſtify the ſervant, and will amount to a command precedent, according to the maxim, *Omnis ratibabitur retro trahitur et mandato æquiparatur.* The defendant has pleaded "not guilty" as to the *clauſum fregit* or local treſpaſs, and the juſtification as ſervant, and taking the cattle by command of his maſter, goes only to the tranſitory treſpaſs.

The queſtion is, Whether the plaintiff's replying *a licence* from the owner of the ſoil and freehold, and afterwards traverſing the command of ſuch owner to the defendant, to drive and impound the cattle, is not immaterial? If the plaintiff had confeſſed and avoided ſuch command, it would have been ſufficient, and he was not obliged to traverſe ſuch command, but he might traverſe it; for as the command goes only to the tranſitory treſpaſs, it is traverſable. And the diſtinction as to traverſing of commands is laid

George *againſt* Kinch.

down in *Trevilian v. Pyne* (*a*), namely, that in *clauſum fregit* the command is not traverſable; but otherwiſe in replevin or treſpaſs laid tranſitorily, as for taking cattle or goods. In treſpaſs *quare clauſum fregit*, which is a local treſpaſs, if the defendant juſtify an entry to the cloſe by the command of or as bailiff to *A.* in whom he alledges the freehold to be, the plaintiff cannot, in his replication, traverſe ſuch command, becauſe it would admit the freehold to be in *A.* and not in himſelf, which would be ſufficient to bar his action, although the defendant had no ſuch command; for it is not material that the defendant has done a wrong to a ſtranger, if it be none to the plaintiff. But in caſe of replevin or treſpaſs for taking goods or cattle, if the defendant juſtify by a command from or as bailiff to *A.* in whom he lays a title to take them as for diſtreſs or other cauſe, there it might be material to traverſe the command or authority; for though *A.* had a right to take the goods or cattle, yet a ſtranger who had no authority from him will be liable; ſo that both parts of the defendant's plea in this caſe muſt be true, and therefore an anſwer to any part is ſufficient.

The caſe 1. *Ro. Rep.* 46. is, as my brother Belfield cites it, that the avowing as bailiff in replevin to the perſon intitled to the freehold, is not traverſable; but the law is now otherwiſe ſettled in the caſe 1. *Salk.* 107. and Rolle, *Chief Juſtice*, diſſented from the other three Juſtices in that caſe in 1. *Ro. Rep.* 46. and cited 33. *Hen.* 6. 3. where is the ſame diſtinction as in 1. *Salk.* 107.

As to the plaintiff's replying a licence, and alſo traverſing the command, and, as it is objected, thereby making his replication double, I think that is aided after verdict; and though the plaintiff ought to have reſted upon his licence, and only have confeſſed and avoided the command, and although an immaterial iſſue is joined in this caſe, yet that is alſo aided after verdict, in the caſe of *Denay v. Mazey*, in 2. *Vent.* 212.: he ſtated that caſe, and then cited *Cro. Eliz.* 456. *Goldſb.* 39. 1. *Sand.* 22. and ſtated them.

Judgment for the plaintiff.

(*a*) 1. Salk. 107.

Caſe 360. Mallock *againſt* Eaſtly.

The *lord of a manor*, worth one hundred and twenty pounds a-year, the *demeſnes* of which are granted to another for life, is not thereby *qualified* to kill game within the 22. & 23. *Car.* 2 c. 25.; for the words "*having an eſtate*, &c" ſignify an eſtate *in poſſeſſion*. And *quære*, Whether he is entitled to kill game on the manor, although he be lord of it, unleſs he be "an *eſquire*, "or other perſon of higher degree," according to the ſtatute.—S. C. but not S. P. 3. Salk. 297. 3. Lev. 227. Cro. Jac. 195. Cro. Car. 553. 7. Co. 17.

"RAWLIN MALLOCK, Eſq. who ſues as well for the "poor of the pariſh of *Paington* in the county of *Devon* "as for himſelf, on the 24th day of *Auguſt*, in the ſeventeenth "year of our now lord the king, exhibited to the Juſtices of our "ſaid now lord the king of the bench here (to wit) at *Weſtminſter*, his certain bill againſt *Charles Eaſtly*, gentleman, one of the attornies of the court of our ſaid lord the king of the bench here preſent here in court, in his own proper perſon complaining of the ſaid *Charles Eaſtly* of a plea, that he render to the ſaid *Rawlin*, and to the poor of the ſaid pariſh the ſum of ten pounds of lawful money of *Great Britain*, which he owns to, and unjuſtly detains from the poor of the ſaid pariſh, and him the ſaid *Rawlin*; for that the ſaid *Charles*, not being a perſon qualified according to the law to kill the game, on the thirtieth day of *October*, in the ſeventeenth year of the reign of our now ſaid lord the king, in the pariſh aforeſaid, in the county aforeſaid, *bad kept and uſed a certain gun, being an engine to kill and deſtroy the game*, and which gun he the ſaid *Charles* had kept and uſed for the intent and purpoſe of deſtroying the game, contrary to the form of the ſtatutes in that caſe made and provided, whereby an action accrued to the ſaid *Rawlin*, who as well, &c. to demand and have of the ſaid *Charles* five pounds, parcel of the ſaid ten pounds. AND ALSO, for that the ſaid *Charles* not being a perſon qualified according to the law to kill the game, afterwards (to wit), on the fourteenth day of *October*, in the ſeventeenth year aforeſaid, at the pariſh aforeſaid, in the county aforeſaid, had *kept and uſed a certain other gun, being an engine to kill and deſtroy the game, and with the ſaid gun did then and there deſtroy one pheaſant*, contrary to the form of the ſtatutes in thoſe caſes made and provided, whereby an action accrued to the ſaid *Rawlin*, who as well, &c. to demand and have of the ſaid *Charles* another ſum of five pounds, reſidue of the ſaid ſum of ten pounds." To which the ſaid *Charles* pleaded, "that he did not owe to the ſaid *Rawlin*, who as well, &c. the ſaid ten pounds, or any part thereof; and of this he puts himſelf upon the country. And the ſaid *Rawlin*, who as well, &c. likewiſe."

Upon trial of the ſaid iſſue ſo joined, it appeared that the defendant, at the ſeveral times when, &c. was ſeiſed in fee-ſimple of the moiety of the manor of *Daccombe* with the appurtenants; the demeſnes of which moiety of the ſaid manor, if they were in poſſeſſion, were worth one hundred and twenty pounds a-year; but at the ſeveral times when, &c. all the demeſnes of the ſaid manor were leaſed out to ſeveral tenants for ninety nine years, determinable on the death of one, two, or three perſons, under certain yearly reſerved rents, amounting in the whole to fifteen pounds thirteen ſhillings a-year. THAT the ſaid *Charles* was alſo ſeiſed in right of his wife of other lands of inheritance, to the yearly value of thirty pounds, and of other lands in reverſion, expectant on the death of his wife's mother, of the yearly value of fourteen pounds.

Whereupon a verdict was given for the plaintiff upon the ſecond count in the declaration, for five pounds, parcel of the ſaid

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debt of ten pounds, for killing a pheaſant out of the defendant's manor. And as to the reſidue for the defendant,

THE QUESTION in law was, Whether the defendant's being ſo ſeiſed of the ſaid manor, lands, and tenements as above, be a qualification?

SERJEANT BELFIELD *for the plaintiff.* The preſent queſtion depends upon ſeveral acts of parliament. The firſt ſtatute is the 22. and 23. *Car.* 2. c. 25. ſ. 3. which enacts, "that all and every perſon and perſons not having lands and tenements, or ſome other eſtate of inheritance, in his own or his wife's right, of the clear yearly value of one hundred pounds a-year, or for term of life, or having leaſe or leaſes of ninety-nine years, or for any longer term of the clear yearly value of one hundred and fifty pounds, other than the ſon and heir apparent of an eſquire or other perſon of higher degree (a). And the owners and keepers of foreſts, &c. are hereby declared to be perſons by the law of this realm not allowed to have or keep for themſelves or any other perſon or perſons any guns, &c.: or other engines aforeſaid, but ſhall be, and are hereby prohibited to have, keep, or uſe the ſame." There are, however, ſome anterior ſtatutes for the preſervation of the game. The 25. *Hen.* 8. c. 11. ſ. 5. is a ſtatute to prevent the killing of *wild fowls* at improper ſeaſons, with this proviſo, "That it ſhall be lawful for any gentleman or any other that may diſpend forty ſhillings by the year of freehold, to hunt and take ſuch wild fowl with their ſpaniels only, without uſing any net or other engines for the ſame, except it be a long bow or long bows." The ſtatute of the 7. *Jac.* 1. c. 11. ſ. 7. made perpetual by the 7. *Car.* 1. c. is made for the preſervation of *pheaſants and partridges*, and qualifies perſons to kill them "which have or ſhall have free-warren, or ſhall be lord of a manor or freeholder, who is or ſhall be ſeiſed in his own right, or in the right of his wife, of lands, tenements, or hereditaments to the clear yearly value of forty pounds, or more by the year, over and above all charges and repriſes of ſome eſtate of inheritance or of lands, &c. in his own right, or in right of his wife, for term of life or lives, of the yearly value of eighty pounds, over and above all charges and repriſes, or who ſhall be worth in goods or chattels four hundred pounds, by him or themſelves, or by his or their menial or houſhold ſervants ſufficiently authoriſed from their maſters, to take pheaſants or partridges in the day-time only, in and upon their own or their maſters free-warren, manor, and freehold, or any part of them." I mention theſe ſtatutes to ſhew the proportion that is carried on from time to time with reſpect to the revenues of perſons intended to be qualified. The defendant has not ſufficient yearly revenues to be qualified to kill the game,

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(a) See Jones *v.* Smart, 1. Term Rep. 44.

All the lands claimed to qualify him, excluſive of the reverſion in the moiety of the manor and demeſnes of *Daccombe*, are not enough to make up a qualification: ſo the ſingle queſtion is, Whether or no a reverſion expectant upon a leaſe or leaſes for ninety-nine years, determinable on one, two, or three perſons dying, is to be conſidered as having of "lands, tenements, or heredita-"ments," within the ſaid ſtatute of *Charles the Second*, ſo as to qualify the reverſioner to kill game, his real yearly income being under one hundred pounds a-year, till the reverſion falls into poſſeſſion? It appears from the ſeveral ſtatutes mentioned, that a revenue to give a qualification muſt not be one in expectancy, but a preſent revenue or income in poſſeſſion. The ſtatute of 25. *Hen.* 8. ſays, that the "perſon qualified muſt be able to diſpend forty ſhillings "a-year." And the two ſtatutes in *James the Firſt's* time ſay, "that the eſtate muſt be of the clear yearly value," which being in the preſent tenſe muſt mean lands in poſſeſſion. Lands, and the reverſion of lands, are two diſtinct things: one man may have lands, of which another man may have the reverſion; the ſtatutes clearly intended, that the qualifications of perſons ſhould be agreeable to the income they have in poſſeſſion. The reaſon why the Legiſlature reſtrained the power of killing the game to particular incomes was, that perſons who could not ſpend ſo much yearly for their families might not loſe their time and neglect their buſineſs in the idle diverſion of ſporting and ſhooting the game.

Mr. Serjeant Eyre *for the defendant*. There is only one queſtion ſtated at the foot of the caſe; yet I will conſider it upon two views,

The first, Whether the defendant as lord of a manor ſimply, without any regard to his yearly revenue, is not qualified to kill game?

The other, Whether the defendant's eſtate, as appears in the caſe, be not a qualification?

As to the firſt, Every lord of a manor is qualified to kill game. The proprietors of manors generally were *barons*, and the manor itſelf compoſed of demeſnes and courts baron. At preſent, indeed, ſeveral perſons have manors without any lands, the demeſnes having been ſold and diſannexed; but the property of a manor diſmembered of its rents and revenues is ſtill conſidered as *a royalty* or juriſdiction ſo favoured as to entitle its maſter to many privileges, and among the reſt that of killing of game. With manors the Crown uſually granted free warrens; and though many ſtatutes have been made to preſerve the game, under ſevere penalties, yet lords of manors have been always conſidered as privileged perſons, and qualified to deſtroy game. The firſt act of parliament which takes notice of lords of manors is the 1. *Jac.* 1. c. 27. ſ. 6. and

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and that ſtatute recites, "That the game was outrageouſly de-"ſtroyed, eſpecially by the vulgar ſort of men of ſmall worth, "who were not able to pay the penalties;" and enacts, "that it "ſhall be lawful to and for every lord of a manor to keep phea-"ſants and partridges, &c." The ſecond ſtatute is the 7. *Jac.* 1. ſect. 11. to the ſame purpoſe as the 1. *Jac.* 1.; and both theſe ſtatutes are made perpetual by a ſtatute in the 17. *Car.* 1. The next ſtatute is the 22. & 23. *Car.* 2. c. 25. which recites, "That divers diſorderly perſons, leaving their lawful trades and "employments, betake themſelves to the deſtroying of the game "with guns, &c. to the prejudice of gentlemen, noblemen, and "lords of manors;" for remedy whereof it enacts, "that all "lords of manors or other royalties not under the degree of an "eſquire may, by writings under their hands and ſeals, authoriſe "one or more gamekeepers within their royalties or manors, who "ſo authoriſed may ſeize all guns, &c. for the killing of game within "the precincts of ſuch manors, as ſhall be uſed by any perſons "who are by that ſtatute prohibited to uſe the ſame: and ſuch "gamekeepers may ſearch houſes in the day-time, by a warrant "from a juſtice of peace, and ſeize guns, &c. to the uſe of the lord "of ſuch manor where they ſhall be found, or otherwiſe cut them "to pieces, or deſtroy them." If by this ſtatute lords of manors may authoriſe gamekeepers to kill game and to ſeize guns, &c. it will be abſurd to ſay, that the lord of the manor has not ſuch power himſelf, for it would be degrading him below the privileges of his ſervant. And why does the ſtatute authoriſe them to make gamekeepers to preſerve the game, unleſs they themſelves had an intereſt in it, and power to take and deſtroy it, and ſeize the guns, &c. of unqualified perſons? Yet it is clear and ſettled, that they may carry guns and kill game within their reſpective manors.

But it may be objected, that no lord of a manor can make a gamekeeper, unleſs ſuch lord of a manor himſelf be of the degree of *an eſquire*. The import of this word *eſquire* is very indefinite. The origin of the name and dignity is very antient and dark. Formerly they were only eſquires who had *jus ſcuti*, or entitled to bear their arms in a ſhield; but now almoſt every-body are eſquires. In the caſe of *Carpenter v. Adams* (a) it was determined, that nobody but the lord or lady of a manor can make a deputy to kill game; and it his ſervant can do it, he himſelf muſt be empowered to do it by virtue of his own inherent right. If the lord of a manor kill game out of his manor, he is liable to an action of treſpaſs, but not liable to the penalty of the ſtatute which is now ſued for. All the treatiſes upon the game laws mention lords of manors to be qualified to kill game; and as the preſent is a penal law, and made for the benefit of lords of manors, it muſt be expounded beneficially for the defendant. The actual poſſeſſion of an eſtate is not the only qualification mentioned in the ſtatute, ſince that is diſpenſed with in the caſe of the eldeſt ſon of *an eſquire*, or of any perſon of higher degree, who are qualified to kill the game, although not worth one farthing.

(a) Comb. 283.

As to the other queſtion, he ſubmitted it, that the defendant may be ſaid to have an eſtate of inheritance to the value of one hundred pounds a-year. He has ſome in poſſeſſion, and the reſt in reverſion after the determination of an eſtate for years. A reverſion is a tenement and hereditament in notion of law, and therefore within the expreſs words of the ſtatute of the 22. & 23. *Car.* 2.; and in the caſe of pleading a reverſion after a term for years, he muſt alledge that he is ſeiſed of it in his demeſne of fee; here is no eſtate of freehold intervening, but only an eſtate for years; and in law, the poſſeſſion of the leſſee for years is the poſſeſſion of the reverſioner.

Willes, *Chief Juſtice.* If the defendant is not qualified, as being lord of a manor, he certainly is not by his eſtate within the ſtatute of the 22 & 23. *Car.* 2. c. 25. ſ. 3. neither within the words or meaning of it. The words are, "having an eſtate;" and a man cannot be ſaid to have an eſtate when another is in poſſeſſion of it, and he himſelf only a *nude* reverſion, or at leaſt not attended with rents ſufficient to make up his other yearly income a qualifying eſtate; and it would be a ſtrong thing to ſay, that a man entitled to a bare reverſion of a thouſand pounds yearly value after the expiration of a thouſand years ſhould be ſaid to be qualified within this act to kill game. But the next words are ſtronger, "of the clear yearly value;" which muſt mean payable to him who is intended to be qualified. But this caſe is leſs within the meaning of the ſtatute; FOR IT appears from the former acts, and the ſtatute of *Charles the Second*, and the meaning of them, that perſons not having ſufficient incomes to maintain themſelves and families (and therefore the ſtatute fixes the income) ſhould not deſtroy their time in theſe idle diverſions or occupations of killing the game. If then reverſions or remainders were to be qualifications, a hundred people might be qualified by one and the ſame eſtate, by limiting remainders properly one after another. Suppoſe a man has a hundred pounds a-year, and owes as much as it is worth, by the conſtruction contended for he may ſell his eſtate, and ſtill preſerve his qualification, for he may ſell it for a thouſand years; and if the reverſion is a qualification, he is ſtill qualified, though a beggar (*a*).

(*a*) An equitable as well as legal eſtate gives a qualification; but the eſtate, of whatever kind it may be, muſt be of the value required, clear of all mortgages or incumbrances created by the owner, or thoſe under whom he claims. Whetherall *v.* Hall, Cald. 230.—See alſo Lowndes *v.* Lewis, Cald. 188. that a life-eſtate of leſs than 150l. a-year is not a qualification to kill game.

But

MALLOCK *againſt* EASTLY.

But I have ſome doubt whether the defendant, as lord of a manor, ſimply, is not qualified to kill game within his own manor. Though the ſtatute of *Charles the Second* impowers all lords of manors not under the degree of "*eſquire*" to impower gamekeepers to prevent the game, &c. and the preſent defendant is only ſtiled "*gentleman*" upon record, yet that will be no obſtruction to his qualification, becauſe the ſubſequent ſtatutes ſpeak of "lords and ladies of manors," without confining them to any degree of gentility; and a lady of a manor cannot bear the title required by the ſtatute of *Charles the Second*; ſo that at preſent a lord of a manor may, I think, make gamekeepers, though under the degree of an *eſquire*. It ſeems a little odd, that the ſervant of the lord of a manor may kill game, and yet the lord himſelf not do it without being puniſhed by a penalty (*a*).

ABNEY, *Juſtice*. In *Cay's Abridgment* of this ſtatute of *Charles the Second* the word "clear" is omitted. This caſe will depend upon the conſtruction of three acts of parliament. The firſt is, the 22. & 23. *Car.* 2. c. 25. ſect. 3.; the ſecond is, the 9. *Anne*, c. 3.; and the third, the 8. *Geo.* 1. c. 19. The qualification is to be conſidered upon the firſt, and is the queſtion of the preſent caſe; the penalty ſued for is given by the ſecond; and the action upon the laſt. At preſent, I think there are three qualifications in force, one of which every man muſt have to be entitled to kill game. The firſt is, of lords of manors, who have not a general qualification to kill game everywhere, but are ſtinted, and confined to the precincts of their own manors; ſo that it will be conſidered whether the defendant has not incurred the penalty, as the caſe ſtates that he killed the pheaſant out of his manor: the ſecond ſort of perſons ſo qualified to kill game are perſons who have titles, as *eſquires*, &c. the eldeſt ſons of eſquires, and of all ſuperior titles; and theſe are qualified to kill game, whether they are poſſeſſed of lands or not, and although they are not freeholders: the third ſort of perſons qualified to kill game are perſons having eſtates; and I am quite ſatisfied that the eſtate of the defendant will not qualify him. This very point was expreſsly determined in the king's bench upon a very great debate ſome years ago, where a young gentleman in *Eſſex*, who had ninety pounds a-year in poſſeſſion and one hundred and fifty pounds in reverſion expectant on the death of his mother, was yet held not to be qualified.

BURNETT, *Juſtice*, was clear, that the eſtate was no qualification, but had ſome doubt as to the other point; for though he imagined that the lord of a manor is entitled to kill game within his manor as well as his gamekeeper, yet he thought he would be liable to the penalty, if he uſed a gun to deſtroy game out of the boundaries of his manor. And here it is expreſsly found, that he killed the pheaſant out of his manor.

(*a*) It is determined, that "an *eſquire*" or other perſon of higher degree, *as ſuch*, is not qualified under the 22. & 23. *Car.* 2. c. 25. though the ſon of an eſquire or the ſon of other perſon of higher degree is. Jones *v.* Smart, 1. Term Rep. 44.

All the Court agreed, that the mere having a gun was no offence within the game laws, for a man may keep a gun for the defence of his houſe and family, but the party muſt uſe the gun to kill game before he can incur any penalty; and they ſaid, this point was ſettled and determined *(a)*.

Adjourned as to one point only.

Hall *againſt* Douglas.

Caſe 361.

In assault and battery, the plaintiff in his declaration recited the original writ, "that the defendant was attached to "anſwer the plaintiff in a plea, wherefore with force and arms he "made an aſſault upon the plaintiff, and him did beat, wound, "&c." And then the declaration goes on, "and whereupon the "ſaid plaintiff by his attorney complains, whereas the ſaid "defendant, on the eighth day of *April*, with force and arms "made an aſſault upon the plaintiff, and did beat, wound, &c." There was another count, "and also that whereas, &c." And the declaration concluded, "whereupon the ſaid plaintiff ſays, "that he is injured, and has ſuffered damage to fifty pounds; and "thereupon he brings his ſuit." Upon the general iſſue the defendant was found guilty.

A declaration in treſpaſs *vi et armis*, though by way of *recital*, viz. "Whereas "the ſaid defendant, on "ſuch a day, "with force and "arms, made an "aſſault, &c." is good, in the *common pleas*, after verdict.

S. C. 1. Wilſ. 99.
S. C. 2. Barnes, 360.
2. Show. 27. 295. 447.
3. Wilſ. 203.
2. Stra. 681. 1162.

It was moved *in arreſt of judgment*, becauſe the declaration is totally recital, and nothing poſitive againſt the defendant.

Draper, *Serjeant*, *for the plaintiff* argued, that although the declaration begins with a recital, it concludes with a poſitive averment that by reaſon of the two batteries the plaintiff is injured, and has damage to fifty pounds, and therefore the preſent objection is a trite one; and though there are two or three old Books where it has prevailed, yet by the ſeveral modern authorities it is quite diſcountenanced. In *Daile* v. *Coates* (*a*), in treſpaſs, the writ was for breaking the plaintiff's houſe *vi et armis*, &c. the doors, and taking away his goods; the count was to the ſame effect, but omitting *vi et armis*, and without ſaying *bona ſua*; after a writ of enquiry of damages awarded, for want of a plea of the return thereof, it was moved in arreſt of judgment, first, that *vi et armis* was omitted in the count; secondly, that it was not alledged in the count that the plaintiff had any property in the goods, for it is not ſaid *bona ſua*; but the plaintiff's Counſel anſwered, that in the common pleas the writ was part of the count, and the matters omitted in the count were in the writ; and ſo the writ ſhall make the count good,

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(a) This point was ſettled in Trinity Term, 11. *Geo.* 2. Rex *v.* Gardner, 2. Stra. 1098. 14. Viner. Abr. 3.— See alſo upon this ſubject Rex *v.* Filer, 1. Stra. 496. Wingfield *v.* Stratford, Sayer, 15. S. C. 1. Wilſ. 315. Rex *v.* Hunt, Dougl. 683. *notis.* Avery *v.* Hole, Cowp. 825. Rex *v.* Hartley, Cald. 175. Rex *v* Thompſon, 2. Term Rep. 18.

(a) 2. Lutw. 1509.

Hade *against* **Douglas.**

for the count refers to the writ; and the plaintiff had judgment. In the caſe of *Hardy v. Taylor* (*a*), error to reverſe a judgment in treſpaſs, becauſe the declaration was *pedibus ambulando*, *&c.* without ſaying *ad valentiam* in the count: but as this was in the writ, the Court thought it good enough; and there is a *quære* put by Twisden, *Juſtice*, Whether there is not a difference, as to this, between a ſuit by bill and original? In *Warren v. Lapdon* (*b*), in treſpaſs, the plaintiff declared *quare cum*; it was moved in arreſt of judgment; but no rule was made, the Court being of opinion, that though the *cum* in the count, if it ſtood alone, might be bad, yet the recital of the original which goes before helps it. That the preſent is not to be compared to actions of debt upon bonds, where the declaration begins with recital, as here, "whereas the "defendant became bound to the plaintiff, &c. yet the defendant "has not paid the plaintiff, whereupon, &c." This is the ſame caſe, as it concludes with a poſitive averment.

Mr. Serjeant Prime *for the defendant*, that judgment ought to be arreſted, and cited *Briggs v. Sheriff* (*c*): That was error of a judgment in the common pleas, in treſpaſs of battery, becauſe the declaration is, "*quod cum*, *&c.*" becauſe there is no abſolute affirmation of the treſpaſs, but only by inference; but an action upon the latter caſe is good enough. The reaſon is, becauſe in treſpaſs *vi et armis* a fine is to be paid to the king by the party for breach of the peace; and therefore the treſpaſs muſt be poſitively averred: but in the latter caſe damages are only to be recovered, and the defendant amerced. That in actions upon the caſe, indeed, the conſideration is laid by way of recital, "whereas the defendant "is indebted to the plaintiff, &c.;" but then there follows a poſitive averment, "that in conſideration thereof the defendant "promiſed, &c. and has not performed, &c."

Serjeant Draper *in reply*, That the whole declaration in caſe is recital, and only the breach alledged poſitively; that the caſe of *Briggs v. Sheriff* was cited in *Good.* 251.; and yet that caſe, though commenced originally in the king's bench, is adjudged contrary to *Cro. Eliz.* 507.; that all the other caſes he has cited (*d*) are all of them ſuits originally commenced in the king's bench, where they declare againſt the defendant *in cuſtodiâ mareſchalli*, and the bill is not part of the count; and there has been formerly a diſtinction between ſuits commenced in the two courts, whereby ſuch declarations have been always aided in this; and now the king's bench itſelf holds ſuch declarations to be good, even in that court, and aid it by ordering it to be filed; and they did ſo in a late caſe: ſo that all theſe reſolutions are overturned.

Mr. Serjeant Bootle then ſtood up as *amicus Curiæ*; and ſaid, he was of Counſel in a late caſe in the king's bench, where

he

(*a*) 1. Sid. 150.

(*b*) Barnes, 174.

(*c*) Cro. Eliz. 507.

(*d*) 2. Lev. 206. 2. Jones, 197. 2. Salk. 636. Bulſt. 214. Cro. Jac. 47.

he took the ſame objection to a declaration there as is made in the preſent caſe; that the Court over-ruled it by ordering the bill to be filed; and that they would amend the declaration by that: ſo that now both courts are uniform as to their reſolutions, and there is no diſtinction whether the ſaid ſuit be by original in the common pleas or by bill in the king's bench, for both courts will now amend.

Willes, *Chief Juſtice.* There are a multitude of antient caſes where the words "*quare cum*" and "*quod cum*" in declarations of treſpaſs have been held to be fatal. But the Judges in modern times have been diſſatisfied with the doctrines of thoſe caſes; and fearful of directly declaring they were not law, yet very deſirous to get over them, they endeavoured at a diſtinction; and it has been three or four times determined, that there is a difference between ſuits commenced *by original* in this court and *by bill* in the king's bench; and though it might be right to arreſt judgment in the king's bench for ſuch a defect as the preſent, yet it would be otherwiſe in this court, becauſe the original is part of the count; and if the original is right, and the count wrong, yet the latter may be helped and amended by the former; but otherwiſe in the king's bench, for there the bill is not part of the count; for there you declare againſt the defendant *in cuſtodiâ mareſchalli*; and though the bill be right, yet if the count be wrong, it cannot be amended by it. But if I was in that court, I would break through that diſtinction: and I am glad to hear from THE BAR that they have done ſo in a late caſe there, by ordering the bill to be filed, and amending the count by that; for it would be ſhameful that ſuch an objection as this, after the ſtatutes, ſhould overcome a verdict. As to the diſtinctions between actions on the caſe and debt, or why this declaration of treſpaſs of aſſault *vi et armis* is not as well as actions upon the caſe or debt, I cannot tell. The principle I go upon is, to prevent the forms of things deſtroying the ſubſtance. If this objection had been aſſigned ſpecially for cauſe of demurrer, it might have met with different ſucceſs; but as it is made after verdict, it may receive a plain anſwer, becauſe if there be enough found to give judgment upon, there it is cured; and I am of opinion, that there is ſufficient found to give our judgment according to the juſtice of the caſe. The preſent averment is as good as in all actions of the caſe; for in ſuch declarations not only the conſideration, but even the promiſe, the foundation of the action, comes by recital, and under a "whereas," and is like the preſent caſe. But I ſhall anſwer further, that though the averment in the preſent caſe is not according to the common form, yet the plaintiff could not obtain a verdict, without proving what comes under the "whereas" at the trial. The declaration is, "whereas the "defendant did ſuch a thing to the plaintiff, *unde* he is damaged;" the word "*unde*" is properly tranſlated, "by reaſon whereof he "received damage," the jury having given damages; and they muſt be by reaſon thereof, becauſe there is no other laid for them to give damages upon. It is the ſame thing as though it had been averred

HALL *againſt* DOUGLAS.

averred at firſt, but the laſt words firſt; and ſuppoſe the declaration begun, "the plaintiff is damaged in twenty pounds, by reaſon that "the defendant beat him," this would be a good averment; and the preſent caſe is like it.

ABNEY, *Juſtice.* I remember it was always mentioned in the king's bench, that ſuch declaration as this was good in this court, though bad in that: the form of declaring in the courts was conceived to occaſion the difference; here there is an original, but there there is none. But I am now glad that they help ſuch declarations in that court after verdict by amendment, by ordering the bill to be filed. I agree with my LORD CHIEF JUSTICE in everything.

BURNETT, *Juſtice.* I remember the caſe of *Franklyn* v. *Reeves* cited by my Brother; and the concluſion LORD HARDWICKE came to was, that as in the common pleas he took the writ to be part of the declaration, he would ſend for the original by awarding a *certiorari*; and when that comes here, we ſhall have the ſame foundation to amend by as the court of common pleas would; and the judgment was affirmed.

THE COURT. Rule for arreſt of judgment muſt be diſcharged (*a*).

(*a*) See White v. Shaw in the common pleas, where a declaration in treſpaſs *vi et armis* "*quod cum*, &c." was held good on a ſpecial demurrer. 2. Wilſ. 203.

Caſe 362. Wynne *againſt* Wynne.

In what caſe a common recovery cannot be amended.

S. C. 1. Wilſ. 35. 42.

THE FOLLOWING RULE was obtained to ſhew cauſe why a recovery ſhould not be amended: "TUESDAY, the ſeventeenth
" day of *April* 1744, *Eaſter Term*, in the ſeventeenth year of *George*
" *the Second*, upon reading the record of the recovery ſuffered
" between the ſaid parties in *Eaſter Term* 1740, and the indenture
" declaring the uſes of the ſaid recovery, IT IS ORDERED, that
" *Watkin Wynne*, *Eſq.* and *Jane* his wife, which ſaid *Jane* claims
" title to the remainder of the premiſes compriſed in the ſaid
" recovery, upon notice of this rule to be given to them, ſhall
" ſhew cauſe to this Court, on *Thurſday* the twenty-ſixth day of
" *Auguſt*, why the record of this recovery ſhould not be amended by
" ſtriking out the words "*at which day*," relating to the return of
" the writ of ſummons to warrant, and inſerting inſtead thereof
" the words following, "*before which day, that is to ſay, on the*
" *fifth day of May, in the ſame Term*," upon the motion of the following *Serjeants*, WILLES, WYNNE, HAYWARD, and DRAPER, for *James Apperley* the ſurviving vouchee, and for the demandant and tenant.

And now in *Trinity Term*, in order to induce the Court to the above amendment, the affidavit of *Mr. Thomas*, who was employed by *Dr. Apperley* and his wife to ſuffer the recovery, was read, and ran thus:

“THOMAS THOMAS ſwears, that being employed by *Dr. Apperley* to ſuffer a common recovery in ſeveral manors, &c. in which *Watkin Wynne, Eſq.* and *Corbett Kynaſton, Eſq.* are demandants, the ſaid deponent *Thomas Thomas* tenant, and the ſaid *Dr. James Apperley* and *Alathea* his wife the vouchees, he, the ſaid deponent, did, ſome time in the month of *April* 1740, iſſue out and ſend down unto *Dr. Apperley* a writ of *dedimus poteſtatem*, directed to certain commiſſioners therein named, to take the warrant of attorney of him the ſaid *Dr. Apperley* and *Alathea* his wife; and the ſaid warrant being taken and acknowledged, the ſame, together with the ſaid writ of *dedimus*, were returned to the ſaid deponent, in order to have the ſaid recovery arraigned at the bar; and that the ſaid deponent having prepared a proper *præcipe* at bar, he attended at the bar of this honourable Court, on the fifth day of *May* 1740, with the ſaid *præcipe*, *dedimus*, and warrant of attorney, and the ſaid recovery was then and there arraigned according to the uſual form of arraigning recoveries; and the ſaid recovery being ſo arraigned as aforeſaid, the ſaid deponent did, on the ſeventh of *May*, compound the writ of entry in this cauſe (which writ is teſted the ſecond of *April*, in the thirteenth year of *George the Second*, and returnable from *Eaſter Day* in fifteen days, as appears by a copy of the ſaid writ in the deponent's cuſtody, who upon the ſeventh of *May* aforeſaid paid unto *Mr. Stephen Wicking*, who acts as deputy-receiver of the fines or king's ſilver, the compoſition-money or king's ſilver paid upon the ſaid ſeventeenth day of *May*; for that it appears by the ſaid defendant's day-book, wherein he makes an entry of the ſeveral ſums of money he lays out for his client's account, that he paid, on the ſaid fifth of *May*, for paſſing the recovery in this cauſe at bar and for court fees, the ſum of nineteen ſhillings, and that he paid the compoſition-money or king's ſilver on the ſeventh of *May* to the amount as above). But after judgment and execution of this recovery, *Watkin Wynne* and *Jane* his wife come into the court of king's bench, and bring their writ of error, ſuggeſting, that the ſaid *James Apperley* and *Alathea* his wife, the vouchees in the ſaid recovery, at the time of proſecuting the writ of entry, were ſeiſed of the ſaid manors, &c. in their demeſnes of fee tail, that is to ſay, to the ſaid *Alathea* and the heirs of her body, remainder to the ſaid *Jane*, the wife of the ſaid *Watkin*, and to the heirs of her body iſſuing; and *Watkin* and *Jane* his wife aſſign for error, that *Alathea* died at *Shrewſbury* on the tenth day of *May*, which is before the rendering of judgment, and that ſhe never had any iſſue of her body, and ſo the judgment is erroneous; and pray for ſuch error the judgment may be revoked and annulled, and that the ſaid *Watkin* and *Jane* his wife to all that they had loſt by the rendering of that judgment may be reſtored. *Watkin Williams Wynne*, the ſurviving demandant, being warned into the king's bench, takes iſſue, that *Alathea* did not die before judgment: which iſſue went down to be tried; and the jury at

WYNNE *againſt* WYNNE.

" *Shrewſbury* found a ſpecial verdict, that *Alathea* died on the " tenth of *May*, but know not whether that was before judgment, " but ſubmit it to the Court. After two arguments of ſuch ſpe- " cial verdict, the Court of King's Bench were of opinion una- " nimouſly, that *Alathea* died before judgment, till they had applied " to the court of common pleas to have the recovery amended in " the manner as is above ſtated."

SKINNER, PRIME, and BOOTLE, *Serjeants*, ſhewed cauſe againſt the amendment; and there were ſome affidavits read, that the Court ſhould not favour *Dr. Apperley* in this amendment, becauſe he was no purchaſor for a valuable conſideration, but a mere volunteer; and though he married a lady with ſo large an eſtate, and had a large fortune of his own, yet he made no ſettlement upon her; that the plaintiffs in error were entitled to this remainder after an eſtate tail which is now ſpent; and that ſuch remainders are valuable things in equity; and cited 2. *Vern.* 551. 1. *Wms.* 470. 485.

SKINNER, *Serjeant.* Although common recoveries are favoured as common aſſurances, and though amendments have been allowed even after a recovery has been ſuffered thirty years, yet the preſent is ſuch a caſe as is not entitled to it. The forms of judicial proceedings are to be kept up, leſt it be a temptation to clerks to grow negligent in the entries. In *Palm.* 228. it is ſaid, when recoveries are ſuffered by thoſe who are enabled to do ſo by law, they are to be favoured, otherwiſe they are to be taken ſtrictly. The perſon here was enabled to ſuffer a recovery; but this is not ſufficient, without complying with the modes the law preſcribes in its conveyances, although there appeared a plain intention in the parties to ſuffer this recovery. Bargains and ſales without inrolment, or releaſes without antecedent leaſes for a year, will not paſs eſtates, let the intentions of the parties appear ever ſo ſtrong. The miſtakes or mere *vitia clerici* may be ſet right, if there are proper things to amend by, or it appears that the inſtructions are right; they muſt, however, be ſhewn: but the ignorance of clerks is never amendable. There is nothing here to amend by. The inſtructions to the clerk or deed to lead the uſes cannot help this record, nor is there any one part of the rolls whereby the preſent amendment can be granted, for there is never any entry or memorandum at what day recoveries are arraigned at bar. Where the tenant comes in perſon to the bar, and vouches to warranty, if the vouchee do not appear the tenant prays a ſummons to warrant, and it is awarded to fetch in the vouchee; but in this caſe the prothonotary only enters the appearance of the tenant; and judgment, where there is ſuch ſummons, cannot be given till the return thereof. But the prothonotary never enters the appearance of the vouchee, where there is a ſummons to warrant; ſo nothing appears upon the roll when the vouchee did appear; if not, then this amendment cannot be made, that the vouchee appeared on the fifth of *May*, becauſe the record can give no inſight to ſuch alteration;

tion; and *Mr. Thomas*'s affidavit, which is only a matter *in pais*, cannot be received as authentic enough to alter a record, which ought only to be rectified by ſome part of the record itſelf, or at moſt by the indentures to lead the uſes, and not by affidavits, which were not part of the tranſaction, but made long after the recovery was completed and everything cloſed. He then cited 1. *Leon.* 86. where it was moved by *Serjeant* Walmesley, if a common recovery be to paſs at the bar, and the tenant is ready at the bar, and vouches to warrant *A.* for whom one is ready at the bar, and the tenant is ready at the bar to appear for the vouchee by his warrant of attorney, it was held, that this appearance was merely void, for in ſuch caſe the vouchee ought to appear in perſon, becauſe there was no ſummons; but where ſummons iſſueth, and the ſame is entered upon the roll, there the vouchee at the return may appear in perſon or by attorney; and this was the clear opinion of all the Juſtices, and alſo of the prothonotaries. In the preſent caſe there is a ſummons to warrant, which was not returnable till the ſixteenth of *May*, and the vouchee could not appear either in perſon or by attorney till then. It happened ſhe died on the tenth of *May*, which was before the return; and the amendment prayed for is, that ſhe appeared by attorney on the fifth of *May*, and ſo judgment given before her death. If this amendment is made, it will purge one error by making as great a one, *viz.* that the vouchee appeared by attorney before the return of the ſummons to warrant, which will make the recovery void, according to that caſe in 1. *Leon.* 86. It is quite reaſonable that where there is a ſummons to warrant, the vouchee ſhall not appear, either in perſon or by attorney, till the return thereof, becauſe the cauſe is continued to the day of the return of the ſummons, by entering, "that the ſame day" (the return day of the writ of ſummons) "is given to the parties aforeſaid;" ſo that if the vouchee could appear before the return of the ſummons, it would be a ſurprize upon the demandant, who does not expect to count againſt the vouchee until the day given by the Court to all the parties, which is the day on which the ſummons is returnable.

Mr. Serjeant Prime *againſt the demandant.* I do not know but as this eſtate was the wife's, that the recovery ſuffered by her was a void act, for the warrant of attorney may be preſumed to be given by compoſition; for the *dedimus poteſtatem* requires no ſeparate examination, but is general to take the warrant of attorney of the huſband and wife; and the wife might comply *propter terrorem.* Though fines and common recoveries are the higheſt public aſſurances, yet there are frequently ſuch defects in them as the Courts think incurable; and they are frequently reverſed by writs of error. In *Sir Nicholas Bacon's Caſe* (*a*), a recovery was held to be erroneous, and reverſed, for a miſtake ſomething like the preſent. This Court goes further in the amendments of fines and recoveries than of adverſary proceedings; but there

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(*a*) Dyer, 220.

are no inſtances of amendments of recoveries but where all the parties or their repreſentatives who are intereſted aſſent, or where the party who prays the amendment has great equity on his ſide by paying a valuable conſideration. The preſent caſe is ſtripped of all thoſe ingredients; for Dr. *Apperley* is a volunteer only, and the amendment is oppoſed by the perſons in remainder. The recovery is out of court, for the writ of error has removed it into the king's bench, and the roll here remains as a dead letter. And there is no ground to ſay we ſurpriſed Dr. *Apperley* by removing it without notice; for there was an application by us to this Court, upon the authority in 2. *Vent.* 90. to ſet aſide this recovery for irregularity, which was ſome notice. The caſe in 2. *Vent.* 90. is thus: *Sir Thomas Gower* had, upon a commiſſion, made an attorney in order to ſuffer a recovery in the ſucceeding Term; and in that Term the Court was moved, in behalf of the heir in tail, to ſtop the paſſing of the recovery, upon ſeveral affidavits that *Sir Thomas Gower*, ſince the making an attorney, was dead in *Ireland*; and the Court, being ſatisfied of the truth thereof, did ſtay the paſſing of the recovery, becauſe if it ſhould paſs it would be erroneous. But we in our caſe made our application too late, becauſe the recovery was perfected; and our motion was denied, the rather, becauſe *Alathea* dying before, the rendering judgment was error, and the recovery might be reverſed upon a writ of error. After all this notice, the defendant in error lay by, ſuffered the recovery to be removed, errors to be aſſigned, took iſſue upon them, and let a ſpecial verdict be found, and never applied for an amendment till the Court had given their opinion againſt them. As to the amendment itſelf, he ſubmitted, that this was a fact which was not amendable. A record containing an act of the party, as his appearance or non-appearance, nonſuit, default, or ſuch acts, when once recorded, is not amendable. Acts of the Court are amendable, as appears from 2. *Salk.* 567. 5. *Mod.* 398. but not acts of the party. In amendments of recoveries, indeed, the Court has gone further than in other caſes; but this always either on the ground of aſſent or equity. This Court in common recoveries has amended the omiſſion of parcels which has been the fault of the parties themſelves, and not of the officers of the court; for it has been done where the parcels have been omitted in the inſtructions given to the officer; which is carrying the ſtatutes of amendments beyond all the rules in *Blackmore's Caſe* (*a*). Still ſuch amendments muſt be agreeable to the truth of the fact. But that which is now prayed for contradicts the truth; for it is attempted to alter the record, and to ſay, that the vouchees appeared by attorney on the fifth of *May*, which is impoſſible, for there was no warrant of attorney then in court; for that was not ſent here by *mittimus* out of chancery until the eighth day of *May*; and nobody can take notice of the warrant of attorney till then.

(*a*) 8. Co. 156.

Serjeant Bootle *to the ſame purpoſe*; adding, that the caſe of *Wynn v. Lloyd* was not quite like the preſent, for the Court intended, that the vouchee came in perſon and made an attorney in court, and preſumed the ſummons to warrant in that caſe to be a nullity; but there can be no ſuch intendments here, for *Mr. Thomas* ſwears that *Mrs. Apperley* appeared by virtue of that warrant of attorney; that he came to the bar and had the recovery arraigned; and this takes off all the preſumption that ſhe either appeared in perſon or made an attorney at bar, or any other warrant of attorney than what is ſtated to be founded upon the ſummons to warrant.

Willes, *Chief Juſtice.* Moſt of the objections againſt this amendment may be laid out of the caſe. And firſt, that of *Dr. Apperley's* being a volunteer; for we ſhall not determine upon equity, but upon the right, as it appears before us. The length of time may alſo be laid out of the caſe, for that is not above three or four years, and we frequently amend recoveries after forty years. As to the objection, that there is nothing to amend by except *Mr. Thomas's* affidavit, and that that would be dangerous to ſteer by, it being no part of the record; conſidering the nature of the caſe, I think that is a proper thing to amend by. If parcels are omitted being put into a recovery, we will not ſuffer them to be added, or the recovery to be amended, upon affidavit, becauſe that is not the beſt evidence that can be got, becauſe the deed to lead the uſes is a better. So if a clerk miſtake his inſtructions, or omit anything out of them, we will not ſuffer things to be verified and ſet right by affidavit only, becauſe the inſtructions themſelves are better evidence. But the beſt and the only evidence we can have of the time of arraigning this recovery at bar muſt be by affidavit, for there are no minutes, either by the Serjeants or the prothonotaries, in their paſſing recoveries, to aſcertain the preciſe time or day in which they are arraigned and ſuffered. Indeed, there is a caſe in *Pigott's Recoveries*, that the affirmation of the Serjeants is not to be regarded, and that nothing is to be ſo but what appears upon the record. But that is falſe. I have been at the pains to read that treatiſe quite through, and never met with one more fruitful of errors in my life, among which the above is an egregious one. *Mr. Pigott* was a very learned man, and would have bluſhed to have publiſhed anything ſo inaccurate; but it is a poſthumous work, and therefore it is no wonder that it is no better than what it is. I mention this that young gentlemen may not be miſled by it. There then appears to be ſufficient proof that this recovery was arraigned at bar on the fifth of *May*; and we ſhall not ſcruple to make the amendment prayed, if it will be ſignificant, and ſet the recovery right; but we will not make a nugatory amendment, or rectify one error by creating a freſh one, which would oblige the parties to aſſign new errors in the king's bench. Here are no affidavits that *Mrs. Apperley* appeared in court from the beginning to the completion of this recovery; and we can preſume nothing in our own court, where recoveries are ſuffered, but what is verified to us, though we can preſume in many caſes what is done in other courts. If ſhe had appeared in perſon on the fifth of *May*, I think this recovery might have been made valid, for then ſhe might have appeared before the return of the writ of ſummons to warrant, and all would have been well. But as ſhe has only appeared by attorney, he had no day in court till after the return of that writ, which was not till ſome time after her death; and his appearance after her death is error in fact, becauſe death is a revocation of his power of attorney; and if we alter the record, and ſay he appeared before her death, that will, I am afraid, be error in law, becauſe it will be an appearance when he had no day in court.—Let this be ſpoke to again next Term by the Counſel for the amendment. We will effectuate the recovery, if poſſible.

This caſe did not come on to be argued again until *Hilary Term*, in the ſeventeenth year of *George the Second*, 1744; and then it was argued by *Serjeants* WILLES, HAYWARD, and DRAPER, in ſucceſſion, as follows.

WILLES, *Serjeant*. Recoveries are the favourite children of this court, as they are the general aſſurances of the nation; and it is for the end of ſupporting them that the Court preſumes tenants to the *præcipes* and ſurrenders of life-eſtates, when no ſuch appear. The preſent recovery is entered up wrong in fact; and the Court will not ſuffer an entry which is falſe in fact to ſtand upon a record, becauſe to do ſo would be to deſtroy it. The common amendments of inſerting names of places and perſons are ſtronger than what are now prayed; and yet ſuch amendments are numerous, and in daily uſe. When a townſhip or place is inſerted which was not in the writ of entry before, it is in fact making a recovery of ſuch added lands of which there was no plea depending before, and yet the Court does them without ſcruple. Of liberal amendments made in common recoveries he cited *Pigott*, 167, 168, 169, &c. It is objected to us, that if we obtain our amendment, we ſhall be only purging one error at the expence of erecting another; which will be as fatal, becauſe the amendment prayed is, that the attorney for the vouchees appeared before the return of the writ of ſummons, which he could not do, having no day in court till then. It is clear, that the vouchee might have appeared in perſon before the return of the ſummons, and the recovery ſuffered thereupon would be good; and the Court may be ſaid to have accepted of ſuch appearance. To this purpoſe is the caſe of *Gravenor* v. *Maſſey*, in 1. *Leon.* 291. where a writ of error was brought to reverſe a common recovery, and error was aſſigned, becauſe the vouchees appeared by attorney the ſame day they were vouched, which they ought not to do by law; but they might appear *gratis* the firſt day, without proceſs, in their proper perſons: and *Coke* as to this ſaid (who was only a Counſel), that although the vouchees cannot appear thus by attorney, yet when the Court had admitted their appearance by attorney, it is well enough, and no error. As to the caſe in 2. *Vent.* 90. there

Sir Thomas Gower died before the return of the writ of entry: though an attorney was appointed by *Sir Thomas Gower*, yet that attorney never appeared in the life-time of his conſtituent, which is not the preſent caſe, for here the attorney appears in the life-time of *Mrs. Apperley* As to the caſe of 1. *Sid* 94. the party died before the return of the writ of covenant, and the fine was reverſed, becauſe there was no cauſe in court, nor was there anything upon record for it to attach its juriſdiction upon. The caſe in *Salkeld* was a fine alſo reverſed upon the ſame ground. He concluded with citing the caſe of *Wynne v. Lloyd*, in 1. *Lev.* 130. and inſiſting ſtrongly upon it.

Wynne, *Serjeant, for the amendment.* The queſtion will be, Whether the recovery will be right, if we ſhould obtain our amendment as prayed? And that will depend upon this, Whether the vouchee may appear at the return of the ſummons? It muſt have been purſued, and he could not have appeared otherwiſe, or before ſuch time. But the directory part of the *dedimus* is not tied down to ſuch time, but is to appear generally. The writ of ſummons is not an original writ, but a mere judicial one of this court only; it is only a writ of form, as many other writs are, as prohibition, and writs of conſultation. They are ſeldom ſued out; or if ſued out, they are never ſerved; for, To what purpoſe would it be to ſerve them? for the ſuffering of common recoveries is no adverſary proceeding, nor is the proceſs of the ſummons to warrant to compel an involuntary perſon to appear; but it is for the benefit of the vouchee himſelf, and for his appearance whoſe intereſt it is to have the recovery ſuffered; and therefore to ſerve the ſummons upon him would be abſurd. The vouchee in fact wants no ſummons; he may be always ſuppoſed ready to vouch, and to accelerate his own proceedings; and he may appear in perſon *gratis* at a ſhorter day than the return of the ſummons; and there ſeems to be no reaſon why he may not do the ſame by attorney: and there is no more inconvenience in the one caſe than in the other, At common law, a man cannot make an attorney at all to appear for him, nor could the Court receive one without licence from the Crown to make an attorney and to receive him; but the *ſtatute of Carliſle* introduces *dedimus poteſtatems* to make attornies; and when attornies are conſtituted, they are in the ſame place, and have the ſame power, with their principals. The words of the warrant of attorney are ſtrong to this purpoſe, viz. *ponent. loco ſuo*, to gain or loſe in ſuch a plea. The reaſon why an attorney may appear with or without warrant is, becauſe he is liable to a writ of deceit to his principal if he appear without warrant; and if he appear with warrant, and miſbehave, the Court can puniſh him by attachment, or the party who is injured may ſet aſide the proceedings if they are irregular. *Palm.* 229. *Booth*, 251. *F. N. B.* 213. 227. and *the Regiſter*, where there are forms of writs *de attornato faciendo et recipiendo*. In *Raym.* 70. it is ſaid to be the conſtant courſe of ſuffering recoveries in *Wales*, or levying fines. I have looked into the practice of the courts in *Wales* and *Booth*, which

which are books of authority, and cannot find any ſuch cuſtom, ſo that the caſe of *Wynne v. Lloyd* is in point.

The Counsel *for the amendment*, conſcious that ſuch amendment as was prayed by the rule would be of no avail to them, becauſe though it would cure one error it would plant as fatal a one in the room of it, now applied for a new ſort of amendment, *viz.* to alter the *teſte* and return of the writ of entry, and of courſe the *teſte* and return of all the other proceſſes, in ſuch manner as to have the ſummons to warrant returnable before the day on which the recovery was arraigned at bar by attorney, and then all would be right; and to this end they prayed, that the writ of entry might be *teſted* in *Hilary Term*, and made returnable *Craſtino Purificationis* of the ſame Term; and the writ of ſummons, inſtead of being returnable on the morrow of the *Aſcenſion*, which was the ſixteenth of *May*, may be altered and made returnable in a month after the day of *Eaſter*, which was the fourth of *May*, in the life of *Alathea*, and when the attorney had a right to appear.

Hayward, *Serjeant*, *for the amendment*. The deed to make a tenant to the *præcipe* is dated early enough for theſe alterations, for it is dated the third of *February*; and it mentions that one or more perfect common recoveries be had and perfected before the end of *Eaſter Term* next enſuing the date thereof, or any ſubſequent Term. The preſent recovery was arraigned at bar on the fifth of *May* that year, and the courſe is, that the recovery is paſſed at bar before any writ of entry is ſued out or anything elſe done; and as the ſeveral writs were taken out after the ſuffering the recovery at bar, if their *teſtes* be miſtaken, or not made agreeable to ſuch recovery, they are the *vitia clerici* and amendable, becauſe the parties have done everything in their power to ſuffer a recovery in purſuance to their deed, and it would be cruel that the miſtakings of the clerks ſhould diſappoint them. But then it is aſked, What we would amend by? The deed to lead the uſes of the recovery, the paſſing it at bar, the minutes of the prothonotary, are all of them grounds to amend by. Inſtances are frequent of amending writs by minutes left with the curſitor. Pleadings have been amended in my memory by the draughts of Counſel in the king's bench. There have been two methods of amending this recovery propoſed; the former, according to the rule, by entering the appearance of the parties upon the fifth of *May*, and that judgment was then given; the latter, and more eligible one, to alter the *teſte* and return of the *præcipe* or writ of entry, and the *teſte* and return of the ſummons to warrant. Before I enter into the argument of this latter amendment, I ſhall not mention what alteration it will make in the ſeveral records: If the writ of entry is amended in the *teſte* and return, and made returnable on the morrow of the

Purification, which was the third of *February*, then there will be a good tenant to the *præcipe* by the deed, and then there muſt be entered upon the *Hilary* roll the court, and the appearance of the tenant in perſon, and the vouching of *Dr. Apperley* and his wife to warrant, and day given for them to appear by attorney: in the paper books, that which is now entered upon the firſt of the rolls of *Eaſter* muſt be entered in the *margin* roll of *Hilary* as of the third of *February*, being the morrow of the *Aſcenſion*; and then the firſt roll of *Eaſter* muſt be vacated, and that can be only done by entering in the margin of it "*vacatur per Curiam*," or "by order of the Court;" then the ſecond roll of *Eaſter*, which begins with the *mittimus*, will remain as it is, only altering the *teſte* of the *mittimus* and the return of the writ of ſummons recited in the *dedimus*; the *mittimus* does not mention the return of the writ of ſummons, ſo that the only alteration upon this ſecond roll of *Eaſter* will be, inſtead of the words "morrow of the "*Aſcenſion*," to inſert theſe words "in a month from the day of "*Eaſter*;" and inſtead of the words "of the ſaid Term," to inſert the words "of the Term of *Saint Hilary* laſt; then the conſequence of the whole will be, that if the ſummons to warrant is made returnable in a month from the day of *Eaſter*, and the appearance by attorney upon the ſame day, then the judgment will be given upon the ſame day, which was the fourth of *May*, when the wife was alive, and the attorney had a day in court to appear in. There is no amendment to be made in the warrant of attorney or caption of it; but the *dedimus* and warrant being filed with the curſitors to make out the *mittimus*, they will appear to be right.

As the record now ſtands, it appears that *Alathea* was alive after the return of the writ of entry, after the *teſte* of the *dedimus*, after the caption of the *mittimus*, and after the arraigning the recovery, but that ſhe died before the return of the writ of ſummons; it is entered that ſhe appeared indeed after the return of the writ of ſummons; this is contrary to the truth of the fact, and what is prayed is only ſuch an amendment agreeable to truth: and it is pretty hard, where parties have done all meſne acts required by law in order to make a good recovery, that all this is to be defeated by a paſt entry contrary to the truth of the fact. The preſent caſe does not differ from the common ones of judgments in debt, where the plaintiff, in caſe he has miſtaken any entry, may move to amend, and it is commonly allowed him. The warrant of attorney is part of the record, and ſo mentioned in *Pigott*, and therefore is amendable as ſuch. With regard to the appointing attornies in ſuits by warrant, no man could do it at common law, but by the king's writ, or in perſon in court: in *F. N. B.* 59. *Reg.* 21. there are many *dedimus's* to impower perſons to make attornies, and they iſſue to the Judges or commiſſioners. As to the other method of appointing attornies in court in perſon, we had an inſtance of it laſt Term, when a nobleman came into court and appointed an attorney. The

method

Wynne *againſt* Wynne.

method of appointing attornies by *dedimus* was found very inconvenient and expenſive, and is remedied by the ſtatute of 15. *Edw.* 2. and other ſtatutes which are in eaſe and aid of the proceedings of the courts of juſtice; and they are only general commiſſions to all the ſubjects of *England* to do that without particular commiſſion which at law they could not; and therefore when a warrant of attorney is filed in this court, it is conſidered as if the conſtituent was in court and appointed the attorney in court, and ſaid, "I put you in my place as my attorney in this "court," and as if the officer took this warrant from the conſtituent's own mouth. The warrant of attorney, in recoveries, is not to appear until the return of the writ of ſummons, and the *dedimus* to make an attorney recites a ſummons; but ſuch ſuggeſtion is immaterial and not traverſable, for the ſummons is only a proceſs founded upon the original to bring a vouchee into court, and when he appeared it is to the original and not to the proceſs. The proceſs is out of the caſe when the party appears, becauſe the proceſs is then anſwered; and therefore miſtakes in proceſs are cured, and cannot be aſſigned for error (*a*). Though a ſummons is not well made, yet if the party appear it takes away error; and ſo if he is not ſummoned at all and appears (*b*). This is the common caſe of every original; as if a *capias* be returnable at a future day, and the party appear before the return day, ſuch appearance is good. He then cited 3. *Mod.* 140. 5. *Mod.* 17. *Keilw.* 566. *Dyer*, 220.

The Court took much time to conſider of this caſe, and did not deliver their opinion until the laſt day of *Eaſter Term*, in the eighteenth year of *George the Second*, 1745; when,

Willes, *Chief Juſtice*, ſpoke as follows the opinion of himſelf, as well as of Mr. Justice Abney and Mr. Justice Burnett, who were preſent in court.—In order to conſider this amendment, it may be proper, in the firſt place, to ſtate how this recovery ſtands; in the next, what the real facts are; and laſtly, the amendments prayed.

The recovery ſtands thus: It is a recovery of *Eaſter Term* 1740. The writ of entry is returnable *quindenâ Paſchæ*, which that year was the twentieth of *April*, ſo that the twenty-third of *April* following was the firſt day of Term, and the appearance day; at which day it is ſaid upon the record "that *William Thomas* the te-"nant comes in his proper perſon and defends his right, when, &c. "and thereupon vouches to warranty *James Apperley* and *Alathea* his "wife, ſummoned in the county aforeſaid; let him have them here on "the morrow of the *Aſcenſion*," which in that year was the ſixteenth of *May*, after *Alathea's* death. "The ſame day is given here to the "parties aforeſaid; and hereupon the ſaid *William Thomas* puts in his

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(*a*) Danv. Abr. "Error" 69.

(*b*) Cro. Eliz. 582. Cro. Jac. 311. 1. Sid. 406. or 416.

“ ſtead *Edward Preeſt* and *Thomas Steward*, his attornies jointly “ and ſeverally, againſt the demandants in their proper perſons, as “ the ſaid tenant by his attornies aforeſaid; and the ſaid vouchees “ *Dr. Apperley* and his wife being ſummoned by *Joſiah Hodgſon* “ their attorney, likewiſe come and freely warrant the manors, &c.” This is that part of the recovery of which an amendment is prayed by the rule. As this recovery now ſtands, it muſt be taken to be ſuffered on the morrow of the *Aſcenſion* and not before, which in that year was the ſixteenth of *May*, when *Alathea* was dead.

As to the fact: it appears upon affidavit, that the writ of entry was *teſted* the ſecond of *April*, and made returnable the twentieth of *April*, which was the firſt return day of *Eaſter Term*; the writ of ſummons to warrant was *teſted* the twenty-third of *April*, returnable on the ſixteenth of *May*; and it could not be returnable ſooner becauſe there muſt be five returns incluſive between the *teſte* and the return of the writ of ſummons to warrant; and at common law there muſt have been nine returns incluſive, but theſe are now abridged by ſtatute to five returns, and there need be no more. The *dedimus poteſtatem* to take the warrant of attorney was *teſted* the twenty-fifth of *April*, and the warrant of attorney executed by *Dr. Apperley* and his wife on the thirtieth of *April*. The *dedimus*, the caption of it, and the warrant of attorney taken thereon, were ſent into court by *mittimus* out of chancery, *teſted* on the eighth of *May*; and it has been proved upon error in the king's bench, and now admitted, that the wife of *Dr. Apperley* died on the tenth of *May*. It is proved by affidavit, that the recovery was arraigned at bar on the fifth of *May*, before her death; but at the ſame time it is admitted that ſhe never appeared in perſon, neither at the return of the writ of entry nor when the recovery was arraigned, ſo every thing was done by warrant of attorney only. It appears, that the deeds of leaſe and releaſe, in which is a covenant to ſuffer a common recovery and alſo a declaration of the uſes, bore date the firſt and ſecond of *February*, before the recovery ſuffered, and executed on the day, or very near the day, on which they are dated.

The objection is, that *Alathea* died before the ſixteenth of *May*, on which it appears, by the record, that the recovery was ſuffered; that ſhe being dead when judgment was given, the warrant of attorney ceaſed and became void; and the recovery being ſuffered upon a void warrant muſt be void alſo.

But in order to cure this, two amendments have been prayed;

The firſt, that inſtead of “ at which day,” which muſt be taken to be the return day of the ſummons to warrant, “ the ſixteenth “ of *May*,” on which the recovery was in fact ſuffered, may be inſerted.

The other amendment prayed, when the firſt would not ſerve, is, that the *teſte* and return of the writ of entry to make it returnable *craſtino Purificationis*, which was the third of *February*, and that the ſummons to warrant may be made returnable the third return of *Eaſter Term*, which was the fourth of *May*, and then all would be regular.

As to the firſt amendment prayed, there is ſufficient foundation in fact to make it, if it would be effectual; but we are all clearly of opinion, that if the record was to be ſo altered, it would be worſe than it is now, and we will not cure one error by giving birth to another, and perhaps a greater; for we are all of opinion, that a vouchee cannot appear by attorney until the return of the ſummons to warrant. The two caſes cited prove this, and beſides it is ſupported by the reaſon of the thing: 1. *Leon.* 86. is expreſs to this purpoſe, where it is held, that in common recoveries the vouchee cannot appear by attorney until the return of the writ of ſummons to warrant. This authority has been much attacked by the Counſel for the amendment, who have ſaid the caſe is anonymous, and only a ſudden opinion given by the Court upon a queſtion demanded by a Serjeant from the Bar: that was no unuſual method formerly, though it is become ſo now; but we think that to be a great authority, becauſe it is ſaid to be the clear opinion of all the Judges and prothonotaries, never contradicted ſince, and ſupported by a very antient caſe, *Bro. Jour. pl.* 39. where it is expreſsly ſaid, that the vouchee cannot appear by attorney but at the day given by the proceſs. Objections are again made to this caſe, that it does not appear whether this is ſpoke of a common recovery or of an adverſary ſuit; but that would make no difference, for rules relative to proceſs are the ſame in adverſary ſuits as in common recoveries: the ſtatute of 16. *Car.* 1. c. 6. ſhews this, which puts both ſorts of ſuits upon the ſame footing, as to the five returns made ſtill requiſite in proceſſes in real actions. Beſides, in the preſent caſe, this rule is juſtified by reaſon and the fact before the Court; for it is admitted that the vouchee did not appear in perſon either at the return of the writ of entry or other time, and that ſhe never was in town during this tranſaction; and therefore there was a neceſſity to iſſue a warrant of ſummons to warrant, and a like neceſſity, as ſhe never was in town, that her appearance muſt be by attorney; and if ſhe never appeared in perſon, there was no day given in court for her to appear in but the ſixteenth of *May*. The law, which requires five returns to a warrant of ſummons, would become ridiculous if the vouchee could appear by attorney before the end of the five returns; but we are all clearly of opinion, that the preſent being an appearance by attorney, and ſo admitted, the attorney could not appear before the return of the writ of ſummons to warrant.

A caſe much relied on, in favour of the amendment, is that of *Wynne v. Lloyd (a)*; but that is no authority as to the firſt amendment now deſired: firſt, becauſe it is difficult to know the fact in that caſe, for none of the Books agree in it: in the next place, becauſe that is not like the preſent in this point, becauſe

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(a) 1. Lev. 130. 1. Sid. 213.

there

Wynne *againſt* **Wynne.**

there is no pretence in that caſe that the vouchee appeared before the return of the writ of ſummons: that was a queſtion which did not ariſe upon a motion to amend, but was an objection to a recovery upon a writ of error; and as it was in another court than where the recovery was ſuffered, there was no room for intendments, which there cannot be in that court where the recovery itſelf was ſuffered, for there the Court is regulated by facts only. Beſides, I muſt own, that I have no great opinion of the determination of that caſe: however, it is not like the preſent; and therefore upon the whole we cannot aſſent to make the firſt amendment, becauſe it would not make the recovery better.

The ſecond amendment, if it could be made, would ſet the recovery quite right; but we cannot grant it by the rules of law, nor is there anything to make ſuch an amendment by, for the facts will not warrant it. The caſes relied upon, as to this ſecond amendment, were three precedents in *Mr. Pigott's Treatiſe of Recoveries*, 173, 174. which are all of them amendments in this court, about the fourth and fifth years of *William and Mary*, in which the Court ordered the return of the reſpective writs of entry to be altered, becauſe returned before the date of the deed which was to make a tenant to the *præcipe*. The doctrine which prevailed at that time was, that the recovery was void, if there was not a tenant to the *præcipe* before the return of the writ of entry; but thoſe caſes in *Mr. Pigott* do not come up to the preſent; there they only amended the return and not the *teſte*, but here it is prayed that both the *teſte* and return may be altered. Beſides, it is more than probable that all thoſe caſes were precedents upon conſent, or for other reaſons than are mentioned in the Book. As to the firſt of them, that of *Bunce v. Greenway*, *Pigott*, 173. that appears to be an amendment by conſent; and by the rule it is alſo recited as a clear fact, that it was the miſpriſion of the clerk; and it is ſaid in the rule, that they read the deed, in which it was covenanted to ſuffer the common recovery, which warranted the amendment; and ſaid in the rule alſo, that the amendment was made by the conſent of all the parties. This makes it probable, if the other rules made in the caſe which *Mr. Pigott* has cited could be found, that they would differ from what he has reported. But the fartheſt that any of theſe rules went was to amend the return of the writ of entry, in order that there might be a tenant to it at its return.

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SECONDLY, If this amendment could be made, yet here is nothing to amend by; for the deeds to declare the uſes, which are the only things to amend by, ſhew it was the intention of the parties that no other writ of entry ſhould be ſued out than the preſent one; for the deed of releaſe ſays, "that a recovery ſhall be "ſuffered before the end of *Eaſter Term* next enſuing, or any other "ſubſequent Term;" ſo that here is no pretence to ſay, that the parties deſigned to ſuffer a recovery in the *Hilary Term* before, or

that

WYNNE *againſt* WYNNE.

that a writ of entry ſhould iſſue ſooner than the preſent has done; but here, in order to make the recovery valid, the writ of entry muſt be *teſted* before the deeds; and if ſuch a writ was permitted to have been taken out, that the vouchees appeared on the third of *February*, the conſequence would be, that the recovery would be a recovery of *Hilary Term*, contrary to the agreement of the parties. Therefore we cannot make the ſecond amendment deſired. I do not know that in any caſes at law we can ſhew favour upon equitable circumſtances; but if we could, the heir at law would be entitled to it, and not *Dr. Apperley*, who is a mere volunteer.

The recovery cannot be amended, and therefore the rule muſt be diſcharged.

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